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ABSTRACT

This report examines the disadvantaged and marginalized condition of the Indigenous peoples of Australia as a human rights issue, focusing on issues concerning Indigenous young people. Permeating the report is the idea that this disadvantage arises from a history of overt and structural discrimination and that special efforts and differential treatment are necessary and appropriate to redress disadvantage and achieve equality in Australian society. Chapter 1 examines current themes in debates about Indigenous policy: moving beyond welfare dependency, accountability of Indigenous programs and services, Indigenous participation in government decisions that affect them, and the national reconciliation process. Chapter 2 profiles Indigenous youth, aged 15-29, and aspects of disadvantage. Demographic and other data include population size, age structure, income, unemployment, overcrowded housing, participation in secondary and higher education, native language use, birth rates, mortality, health risks, hospitalization, and contact with the criminal justice system. International principles of human rights that call for special measures to redress Indigenous disadvantage are discussed, along with the extent of Australia's compliance. Chapter 3 examines the importance of Indigenous identity for young Indigenous people and related international human rights standards. Chapter 4 discusses the Northern Territory's recent abolition of bilingual education; the role of bilingual education in maintaining Indigenous language, culture, and identity; and bilingual education as it relates to educational rights and self-determination issues. Chapter 5 discusses the overrepresentation of Indigenous youth in the juvenile justice and criminal justice systems and the issue of mandatory sentencing in certain regions of Australia. (SV)

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Social Justice Report 1999

Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC. Report No. 2/2000

Report to the Attorney-General as required by section 46C(1)(a) of the Human Rights and Equal Opportunity Commission Act 1986

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Chapter 1: Introduction

This is my first Social Justice Report as Aboriginal and Torres Strait Islander Social Justice Commissioner.[1] It is also the last such report of this century. Accordingly, I have decided to incorporate into the review that is required by my statutory obligations[2] some links with the future.

This report deals with a wide range of issues that relate to young Indigenous people, for they are the future of Indigenous Australia.

All is far from well with the situation of Indigenous young people.[3] Generally speaking, they do not enjoy and exercise their basic human rights to the same extent that non-Indigenous youth do. At the same time, it is from these young people that the future leaders of Indigenous Australia will emerge and, despite the many problems that they face, my experiences with them provide me with solid grounds for hope in a better future.

Indigenous youth, of course, face many of the issues faced by the broader Indigenous community. In this introductory chapter I review some of those issues from a human rights and social justice perspective, before turning specifically to issues that affect young Indigenous people directly in the following chapters.

Permeating this report, and indeed all of my work, is a theme that I have a duty to pursue – the meaning of the principle of equality. By any measuring stick Aboriginal and Torres Strait Islander people are not equal with the rest of Australian society and continue to experience worse socio-economic conditions. Integrally linked to redressing this disadvantage is the requirement that Indigenous people be able to enjoy and exercise fundamental human rights.

What is also particularly clear is that Indigenous people themselves want their situation to change: the fact that marginalisation exists and continues is not the preference of the marginalised, nor is it caused by them. This disadvantage is a human rights issue – much of it being historically derived through overt and structural forms of discrimination. In order to break out of these conditions, and in order for Indigenous people to enjoy a position of equality in Australian society, justice demands that we acknowledge this disadvantage and make special effort to redress it. Governments do not need to be apologetic about adopting differential treatment to redress disadvantage, for it is required in order to achieve equality in Australian society.

When we have the advantaged and the disadvantaged, the haves and the have nots, treating people identically, as if they are the same when clearly they are not, ensures that the disparity in enjoyment of human rights endures. It may even result in an increase in the inequality faced by that group. Positive intervention is needed, and special measures must be adopted. I pursue this theme in chapter 2 of this report.

Current themes in Indigenous policy

In this chapter I examine what I consider to be some of the current key 'dialogues' or themes in debates about Indigenous policy formulation. My role as Social Justice Commissioner is to

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1 I was appointed to the position on 3 March 1999 and took up my appointment on 3 May 1999.

2 Each year I am required, among other duties, to 'submit a report to the Minister... regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the enjoyment and exercise of human rights by those persons.': *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s46C(1)(a).

3 Generally, this report relates to issues facing Indigenous people aged 15-29 years.

ensure that the human rights implications of these themes are understood and fully considered so that they may affect the design of government policies and programs, and the understanding that the broader community has of these. I will focus on the following four inter-related themes:

- Moving beyond welfare dependency;
- Accountability;
- Participation; and
- Reconciliation.

Moving beyond welfare dependency

Recent years have seen a shift in focus of public debate, in Australia and abroad, towards concepts related to mutual obligations. Broadly put this view states that with rights and entitlements come attached responsibilities and obligations. This has been reflected in debates on Indigenous policy in the context of the dependency of many Indigenous people on welfare.

As the federal government's 1999-2000 budget papers state:

> The government commenced its second term with a continuing commitment to address disadvantage suffered by Indigenous people. This commitment incorporates a major effort to assist Indigenous Australians move beyond welfare dependency through improvements in the key areas of health, housing, education, employment and economic development. Until the disadvantage that exists in these areas is addressed many Indigenous Australians will remain locked into welfare dependency with limited opportunities to share in the quality of life and standards of living enjoyed by their fellow Australians.[4]

Welfare in this context is seen as financial support for which no reciprocity or personal responsibility is required from the individual recipient.[5]

The concept of mutual obligation is, of course, not alien to Indigenous peoples. Many Indigenous people argue that it is a concept that is fundamental to Indigenous social and cultural values. Indigenous people do not, for example, see themselves as 'users' of land. They are related to and part of the land, with custodial obligations to nurture and protect it. Native title in this context is seen as a right which enables Indigenous people to fulfil their custodial obligations over the land.

This concept has also been applied to Indigenous people in government programs since 1986. Most notably, it has been applied by the Community Development Employment Projects Scheme (CDEP), which is effectively an Indigenous 'work for the dole' program.[6]

To the extent that this debate reflects the government's desire to improve the situation of Indigenous peoples, so that we are not locked into welfare dependency and can live in situations that are economically viable and sustainable in the long term, I am in agreement. This is a desire that has long been expressed by Indigenous leaders and communities.

It is a desire, for example, that lies at the core of debates over regional governance and the

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[4] Minister for Aboriginal and Torres Strait Islander Affairs, *A better future for Indigenous Australians*, Budget 1999-2000, Commonwealth of Australia, Canberra, 1999, p1.

[5] The Minister has stated this view on numerous occasions. See for example: Minister for Aboriginal and Torres Strait Islander Affairs, *Statement on behalf of the Australian government at the 17th session of the United Nations Working Group on Indigenous Populations*, 29 July 1999, <www.atsia.gov.au/content/media/releases/speech_united.htm>

[6] For more information on the CDEP program, see Race Discrimination Commissioner, *The CDEP Scheme and Racial Discrimination*, HREOC, December 1997.

recognition of native title rights. It was also the basis of the social justice package proposals put forward to the then government in 1995 by the Council for Aboriginal Reconciliation (CAR), the Aboriginal and Torres Strait Islander Commission (ATSIC), and the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner.

However, I have a number of concerns from a human rights perspective about this approach.

It can reduce Indigenous disadvantage to an individual level, implying that there is a lack of responsibility on the part of Indigenous people who are on welfare, while also failing to recognise the broader, systemic nature of Indigenous disadvantage in this country. It can relocate power to the individual, and in doing so absent the government from its position of responsibility.

Furthermore, it makes distinctions between particular types of government programs and policies according to whether or not they are sufficiently connected to the reduction of welfare dependency. The Minister for Aboriginal and Torres Strait Islander Affairs (the Minister) has indicated, for example, that the government is concerned with 'real issues' – health, housing, education, employment and economic empowerment – as opposed to 'symbolic issues' that are not seen as leading to a reduction of welfare dependency.

As an example, while recognising that land is important to Indigenous people 'for cultural, historical and symbolic reasons', the Minister has represented the Government's view that it is 'not a panacea to the social and economic challenges facing Indigenous communities.'[7] After making this comment the Minister then asks in his speech, 'what then are the real issues?'[8] He continues that reducing welfare dependency means:

> policies that facilitate and promote genuine economic independence for Indigenous people ... policies that go beyond the catchcry of land and mining royalties and encompass both individual skills development and productive business enterprises.[9]

In this context, the process of redressing Indigenous disadvantage is broken down into individual programs rather than being viewed as of a broad systemic nature, where programs are necessarily integrated. This focus on individual programs is, in my view, too narrow.

The necessity for adopting a systemic, integrated approach to Indigenous disadvantage was vividly demonstrated in the Royal Commission into Aboriginal Deaths in Custody.[10] Recent research also supports this view. Researchers have found that there is a significant relationship between the arrest record of an Indigenous person and their employment status. The consequence of this is that:

> Ensuring that Indigenous citizens are dealt with in ways which minimise contact with the formal criminal justice system should be a priority policy for governments who are concerned about Indigenous employment outcomes.[11]

Similarly, the 1997 Darwin Declaration of the Royal Australasian College of Physicians acknowledges that:

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7 *ibid.*, p4.

8 *ibid.*

9 *ibid.*, p6.

10 See in particular: Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, AGPS, Canberra, 1991; Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 4*, AGPS, Canberra, 1991.

11 Hunter, B. and Borland, J., 'The effect of arrest on Indigenous employment prospects' (1999) 45 *Crime and Justice Bulletin*, June 1999, NSW Bureau of Crime Statistics and Research, p6.

> The health of Aboriginal and Torres Strait Islander Australians is disastrously poor compared with other Australians and that the fundamental cause is disempowerment, due to various factors including continued dispossession from land, cultural dislocation, poverty, poor education and unemployment.[12]

Issues of health status cannot be separated from issues of land ownership, just as employment issues cannot be separated from issues of contact with the criminal justice system. Policies that do not acknowledge these fundamental linkages stand a reduced chance of being effective in redressing Indigenous disadvantage.

An approach that distinguishes between 'real issues' and 'symbolic issues' is also at odds with the ideological foundations of the international human rights system. This system has at its core the notions of universality and indivisibility of human rights.[13] Put simply, these values reflect that human rights apply to all humans, and each human right applies equally. Consequently, there are not more important and less important rights. Rights to land are not less important than rights to basic levels of health care, education or employment. While governments must undertake the task of prioritising which areas they will focus attention and expenditure on, this does not condone the non-recognition or infringement upon the human rights of Indigenous peoples in other areas.

I am also concerned that in calling for a move away from welfare dependency to economic empowerment there is little acknowledgment that integral to this shift is the empowerment of Indigenous Australians through the full recognition and equal enjoyment of their human rights.

What Indigenous people have consistently called for in the shift from the welfare mentality of governments is a move to a rights-based approach. As my predecessor Dr Mick Dodson stated in the 1995 Social Justice Package proposal:

> The time has come for a fundamental shift in public policy in respect of Australia's Indigenous peoples... At the basis of this shift must be the transition, too little understood, from the administration of Indigenous welfare to the recognition of Indigenous rights.[14]

Indigenous rights in this context encompass equality or citizenship rights – rights which apply to all people simply by virtue of being human – as well as the distinct, collective rights of Indigenous peoples, or identity rights.

Sarah Pritchard has commented:

> Recent discussion about the crippling effects of welfare has suggested that this is a condition desired and perpetuated by Indigenous communities. Such talk ignores the fact that Indigenous peoples have been arguing for greater control over, responsibility for, and independence for their own lives and communities. The 1995 social justice submissions are informed by a desire for real equality with non-Indigenous Australians. They express a commitment to a future in which all Australians enjoy their human rights and fundamental freedoms and in which Aboriginal and Torres Strait Islander peoples are able to exercise their distinct rights as Indigenous peoples. They contain concrete proposals for establishing and developing foundations for Indigenous economic self-sufficiency as an alternative to welfare...[15]

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[12] Cited in Jackson, L. and Ward, J., 'Aboriginal health: why is reconciliation necessary?' (1999) 170 *Medical Journal of Australia* 437, p438.

[13] The preamble to the Universal Declaration of Human Rights describes the thirty articles of the Declaration as 'A common standard of achievement for all peoples and all nations.'

[14] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Volume 1: Indigenous social justice: Strategies and recommendations*, HREOC, Sydney 1995, p5.

[15] Pritchard, S., 'The international arena, Indigenous internationalism and directions in Indigenous policy in

The movement away from welfare dependency is integrally linked to the recognition of the rights of Indigenous peoples. This includes the right to self-determination, to participate in decisions that affect us, as well as having our cultural practices recognised and protected within Australian law. I pursue these themes in chapters 2 and 3 of this report.

Accountability

The Government's Indigenous affairs policies over the past three years have focused on highlighting principles of accountability. This focus has been on the efficient funding of Indigenous programs as well as targeting programs towards areas of the greatest need. The commitment of the federal government in this regard is:

> to pursue a strong agenda promoting rational allocation of resources in Indigenous affairs, a coordinated effort with the states and territories, and a clear outcomes and accountability focus in all expenditure.[16]

I welcome a commitment to ensure the highest standards of accountability possible. For too long a lack of coordination in funding and service delivery has hampered the goal of improving the conditions under which many Indigenous Australians live.

Governments have acknowledged this, as demonstrated by the adoption by the Council of Australian Governments in 1992 of the *National commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders* (the framework agreement). This framework agreement between Australian governments sets out principles on the roles of the different levels of government. It also forms the basis of a series of bilateral agreements between governments such as the benchmarking agreements for Indigenous health programs finalised in August 1997,[17] and similar agreements on Indigenous housing and infrastructure, and education. The framework agreement establishes the following as guiding principles for all levels of government:

> 4.4 effective coordination in the formulation of policies, and the planning, management and provision of services to Aboriginal peoples and Torres Strait Islanders by governments to achieve more effective and efficient delivery of services, remove unnecessary duplication and allow better application of the available funds; and
>
> 4.5 increased clarity with respect to the roles and responsibilities of the various spheres of government through greater demarcation of policy, operational and financial responsibilities.[18]

The framework agreement also acknowledges the importance in improving the effectiveness of service delivery of:

> 4.1 empowerment, self-determination and self-management by Aboriginal peoples and Torres Strait Islanders;
>
> 4.2 economic independence and equity being achieved in a manner consistent with Aboriginal and Torres Strait Islander social and cultural values;

Australia' (1999) 4(23) *Indigenous Law Bulletin* 4, p6.

16 Minister for Aboriginal and Torres Strait Islander Affairs, *A better future for Indigenous Australians*, *op cit.*, 12. The Future.

17 See further: *ibid.*, 7. Health.

18 Council of Australian Governments, *National Commitment* to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders, COAG, Perth, 1992, p5.

> 4.3 the need to negotiate with and maximise participation by Aboriginal peoples and Torres Strait Islanders through their representative bodies, including the Aboriginal and Torres Strait Islander Commissioner, Regional Councils, State and Territory advisory bodies and community-based organisations in the formulation of policies and programs that affect them.[19]

This second set of principles are also measures of accountability. They reflect Australia's international human rights obligations, which require governments to provide services and redress Indigenous disadvantage in a manner that is culturally appropriate, non-discriminatory and with adequate consultation.[20] This is to ensure the effective participation of Indigenous peoples, particularly in the design and delivery of services that affect them.

I discuss the requirement of Indigenous participation further below. In this context it is sufficient to note that it is essential that the apparently objective aim of ensuring accountability is not used as a subterfuge for not addressing the legitimate and clearly expressed aspirations of Indigenous people. Indigenous people have a role in determining what is 'a rational allocation of resources.'

There are several layers of accountability that we should expect in the delivery of services to Indigenous peoples. Accountability should be expected in every aspect of service delivery from the federal government, state/territory and local governments as well as from Indigenous organisations.

There has been great attention on one of these groups in particular in recent years – namely, Indigenous organisations. ATSIC, for example, has been the subject of intense scrutiny. Stringent accountability requirements have been applied, and ATSIC has by and large met these. The public interest in such high levels of scrutiny to an extent reflects a misunderstanding of ATSIC's role:

> Within current resources ATSIC is hard-pressed trying to meet its core obligations as a source of policy advice and as a monitor of service delivery to Aboriginal and Torres Strait Islander people. It is certainly not in a position, either through its legislative charter or in terms of capacity, to fill gaps left by mainstream providers at either the State or Commonwealth level.[21]

There was continuing scrutiny of the accountability of Indigenous organisations in the past year. Amendments to the *Native Title Act 1993* (the Act or NTA) have triggered extensive scrutiny of the operations of Native Title Representative Bodies. These amendments set in train a transitional period during which each representative body must re-apply to the Minister for recognition as the representative body for a particular region. Not all current representative bodies will be able to be re-recognised (as some regions have been amalgamated and the Act now provides there can only be one body per region), and will consequently lose their representative body status and funding. To be re-recognised bodies must indicate that they are capable of fulfilling a range of new service delivery functions as well as meeting rigorous accountability requirements. The implications of these amendments are discussed at length in chapter 5 of my 1999 Native Title Report.

Significantly, in 1999 the Australian National Audit Office also conducted a performance audit of ATSIC's delivery of housing and infrastructure to Indigenous communities under the

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[19] *ibid*

[20] On the meaning of adequate consultation see Jonas, W., *Consultation with Aboriginal people about Aboriginal heritage*, AGPS, Canberra, 1991

[21] Council for Aboriginal Reconciliation and Centre for Aboriginal Economic Policy Research, *Towards a benchmarking framework for service delivery to Indigenous Australians*, CAR/CAEPR, Canberra, 1997, p4

National Aboriginal Health Strategy.[22] This program is the largest single program administered by ATSIC and is complementary to programs administered by the Department of Health and Aged Care.

The Auditor-General concluded that:

- ATSIC has established 'effective mechanisms for the identification and determination of priorities that produce informed and objective assessments of national needs for major housing and infrastructure projects in Indigenous communities';[23]
- ATSIC and the Department of Health and Aged Care are working cooperatively to maximise their combined impact on Indigenous health outcomes[24];
- The selection process for project managers and project implementation by ATSIC establish 'an effective framework for project delivery and place a high level of accountability on project managers to deliver large... projects in accordance with requirements';[25];
- Project management arrangements 'established a framework for project managers to develop good working relationships with communities to deliver appropriate housing and infrastructure to (Indigenous) communities';[26] and
- That ATSIC has joined in effective partnerships with state and territory governments.[27]

The Auditor-General made recommendations aimed at improving the methodology for assessing the relative needs of projects, as well as improving benchmarking and performance targets for the Strategy.[28]

A similar audit was conducted during 1998 of the Aboriginal and Torres Strait Islander Health Program administered by the Commonwealth Department of Health and Aged Care.[29] The Auditor-General concluded that the Department:

> met the Government's and the Parliament's external accountability requirements. However, management processes could be enhanced by greater attention to allocation of program resources on the basis of need;... clearer identification of Indigenous Australians as a special needs group in the Department's mainstream programs; clearer specification of the health outputs and outcomes or performance standards the Department expects from its programs;... (and) greater cooperation with ATSIC in environmental health...[30]

The government also embarked during the reporting year on a significant reform to improve the accountability of the federal and state/territory governments in the delivery of services to Indigenous peoples.

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22 Australian National Audit Office, National Aboriginal health strategy – Delivery of housing and infrastructure to Aboriginal and Torres Strait Islander communities, Aboriginal and Torres Strait Islander Commission, Audit Report 39, 1998-99, ANAO, Canberra, 1999

23 *ibid.*, para 2.26

24 ibid.

25 *ibid.*, para 3.20

26 *ibid.*, para 3.28

27 *ibid.*, paras 3.32-3.41

28 *ibid.*, pp20-21

29 Australian National Audit Office, *The Aboriginal and Torres Strait Islander health program*, Department of Health and Aged Care, Audit Report 13, 1998-99, ANAO, Canberra, 1998

30 *ibid.*, p13

The *Commonwealth Grants Commission Amendment Bill 1999* was introduced to the House of Representatives in March 1999, and passed through the House in June 1999. It was introduced to the Senate in June 1999 but at the time of writing had not entered the 2nd reading stage. The Bill seeks to amend the *Commonwealth Grants Commission Act 1973* (Cth) to provide that the Commission is required to inquire into and report to the Minister into any matters referred to it by the Minister relating to:

- Works and services in respect of Indigenous persons that are provided or funded (directly or indirectly) by the Commonwealth or an authority of the Commonwealth;
- A grant of financial assistance under section 96 of the Constitution to a State for the purpose of being applied by the State to pay for works and services in respect of Indigenous persons in the State; or
- A grant of financial assistance made to a territory State for the purpose of being applied by the Territory to pay for works and services in respect of Indigenous persons in the Territory.[31]

The purpose of the Bill is to further the government's election commitment:

> to work with the Indigenous community and ATSIC to develop and adopt appropriate arrangements to improve the allocation of funding for Aboriginal and Torres Strait Islander peoples. The amendments... allow the government to ask the Commonwealth Grants Commission to develop measures of relative disadvantage that could be used to target resources for the Indigenous community more effectively to the area of greatest need.[32]

It is expected that an inquiry of the scope provided for in the Bill would identify the inefficiency of service delivery to Indigenous people by the States and Territories. For example, it is estimated that 52% of all revenue for Indigenous health programs and 46.1% of funding under the Indigenous Education Strategic Initiatives Program provided to the Northern Territory government is spent on administration.[33] This is an unacceptably high level.

This Bill responds to calls from Indigenous peoples dating back to 1992 during the Commonwealth Grants Commission's 1992-1993 round of review of the relativities for funding distribution between the states and territories. CAR, ATSIC and the Social Justice Commissioner also recommended a version of the Bill in the Social Justice Package proposals in 1995.[34] The Social Justice Commissioner, for example, called for:

> A comprehensive study by the Commonwealth Grants Commission of the potential application of the fiscal equalisation principle among Indigenous communities in Australia. Such a study to be undertaken in a manner which allows for the outcomes to be broken down into both State Territories and regions, and a specific reference to the Commonwealth Grants Commission to explore solutions to the enormous and inequitable capital infrastructure needs of Indigenous communities.[35]

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[31] *Commonwealth Grants Commission Amendment Bill 1999*, Item 3, Schedule 1.

[32] Fahey, J., *Explanatory memorandum – Commonwealth Grants Commission Amendment Bill 1999*. Parliament of the Commonwealth of Australia, Canberra, 1999, p2.

[33] Snowdon, W., *Hansard*, House of Representatives, 21 June 1999, p5430.

[34] Council for Aboriginal Reconciliation, *Going forward: Social Justice for the first Australians*, CAR, Canberra, 1995; ATSIC, *Recognition, rights, reform*, ATSIC, Canberra, 1995; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice Strategies and Recommendations*, HREOC, Sydney, 1995, pp 38-40.

[35] *ibid*., p40. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report*, HREOC, Sydney, 1995, p91.

I welcome the government's initiative in introducing the Bill. I am hopeful it will pass through the Senate and that an inquiry will be referred to the Commonwealth Grants Commission by June 2000.

A concern I have that is related to the passage of this Bill is that, while the Government has budgeted to fund the conduct of an inquiry to develop measures of relative disadvantage to target resources more effectively to the areas of greatest need, it has not as yet made a commitment to devote additional funding to address the relative disadvantage that is identified. Instead, the government has indicated that 'the measures of disadvantage will enable ATSIC and mainstream departments and agencies to improve the allocation of funding to Indigenous people'.[36]

A commitment by the government to provide additional funding to redress the disadvantage identified by the Commonwealth Grant Commission inquiry would be a significant contribution to the reconciliation process.

A further and significant type of accountability of the federal government is to the international community through the upholding of human rights standards and compliance with treaties to which Australia is a signatory. These instruments reflect minimum standards of behaviour commonly accepted by the international community.

Australia was called to account to the international community earlier this year for its treatment of Indigenous Australians. The Committee on the Elimination of Racial Discrimination instituted an early warning procedure against Australia in August 1998,[37] due to its concern that Australia may be acting in violation of its obligations not to racially discriminate against Indigenous people following the passage of the *Native Title Amendment Act 1998* (Cth) in July 1998.

The Committee considered the Australian situation at its 54th session in March 1999. In a decision dated 18 March 1999 they found that the native title amendments breach Australia's obligations under CERD.[38] The Committee expressed concern that:

- the native title amendments raise concerns that Australia is not acting in compliance with its obligations under Articles 2 and 5 of the Convention (the non-discrimination principle and the requirement to provide equality before the law);[39]
- that, as a consequence of this, the amended NTA cannot be characterised as a special measure under Articles 1(4) or 2(2) of the Convention,[40] and
- that the process leading to the amendments raises concerns about the lack of 'effective participation' of Indigenous people in the formulation of the amendments, in breach of Australia's obligations under Article 5(c) of the Convention and contrary to the Committee's General Recommendation XXIII on Indigenous People.[41]

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[36] Minister for Aboriginal and Torres Strait Islander Affairs, *A better future for Indigenous Australians*, *op cit*, 8. Targeting Resources Where They are Needed Most.

[37] Committee on the Elimination of Racial Discrimination, *Decision 1(53) concerning Australia*, 11 August 1998. UN Doc CERD/C/53/Misc 17/Rev.2.

[38] Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia – Concluding observations/comments*, 18 March 1999. UN Doc CERD/C/54/Misc 40/Rev.2. Herein CERD Decision.

[39] CERD Decision, para 8. For an analysis of these obligations see Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC Sydney 1999, pp 30-51.

[40] CERD Decision, para 8.

[41] CERD Decision, para 9.

The findings of the Committee on the Elimination of Racial Discrimination are serious. As I explain in my 1999 Native Title Report, which analyses the CERD decision in detail, their reasons for finding as they did are compelling.[42] The decision reflects the lack of recognition of the human rights of Indigenous Australians. As I noted earlier, human rights are indivisible – this decision cannot be dismissed as not affecting the 'real commitment' of the government to addressing Indigenous disadvantage.

This decision is not the only current international concern expressed about Australia's performance on Indigenous issues. The Committee on the Elimination of Discrimination Against Women expressed its concern in July 1997 at 'the continuing adverse situation of Aboriginal and Torres Strait Islander women.'[43] Their concerns included 'higher rates of maternal mortality, lower life expectancy, reduced access to the full range of health services, a high incidence of violence, including domestic violence, and high unemployment rates.'[44]

The Committee on the Rights of the Child expressed its concern in October 1997 at 'the special problems still faced by Aboriginal and Torres Strait Islander (children)... with regard to their enjoyment of the same standards of living and levels of services, particularly in education and health.'[45] They also expressed concern about the 'unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system... (and) at the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.'[46]

The Committee on the Elimination of Racial Discrimination, in considering Australia's most recent periodic report to the Committee, also expressed concern at the disadvantage of Indigenous people in education, employment, housing and health services, and the rates of deaths in custody.[47] The Committee further expressed its concern that:

> Although the Commonwealth government is responsible for ratifying international human rights instruments, the implementation of their provisions requires the active participation of the states and territories which have almost exclusive jurisdiction over many of the matters covered by the Convention and cannot be compelled to change their laws.[48]

As a consequence of this, and in relation to the treatment of Indigenous Australians, the Committee expressed the view that:

> The Commonwealth Government should undertake appropriate measures to ensure the harmonious application of the provisions of the Convention at the federal and state and

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42 See in particular: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, HREOC, Sydney, 1999, Chapter 2.

43 Committee on the Elimination of Discrimination Against Women, *Concluding observations on Australia*, 22 July 1997, UN Doc: A/52/38/Rev.1, Part II, para 397.

44 *ibid*.

45 Committee on the Rights of the Child, *Concluding observations on Australia*, 10 October 1997, UN Doc: CRC/C/15/Add.79, para 13. Similar concerns were expressed about education by the Committee on Economic, Social and Cultural Rights when they considered Australia's report on Articles 13 to 15 of that convention: Committee on Economic, Social and Cultural Rights, *Concluding observations on Australia*, 3 June 1993, UN Doc: E/C.12/1993/9, paras 8, 11.

46 Committee on the Rights of the Child, *ibid*., para 22.

47 Committee on the Elimination of Racial Discrimination, *Concluding observations on Australia*, 19 September 1994, UN Doc: A/49/18, paras 543, 545. Australia appears before the Committee for its next periodic report in March 2000.

48 Committee on the Elimination of Racial Discrimination, *Concluding observations on Australia*, 19 April 1994, UN Doc: A/49/18, para 542.

territory levels.[49]

The obligation to ensure consistency with Australia's international obligations lies with the federal government, which is accountable for failures of the states to comply with these obligations.

Participation

I have already referred to the requirement that Indigenous people be able to fully participate in decisions that affect them. This is essential in order to secure a move from welfare dependency. It is also a yardstick of best practice which governments must comply with if they are to ensure greater efficiency in service delivery. They are also accountable to ensuring participation of Indigenous peoples to the international community through Australia's human rights obligations.

As noted, Indigenous people have continually expressed the importance of this principle, as well as reiterating the fact that we are, like all Australians, entitled by right to participate in decisions that affect us. The requirement of participation and adequate consultation is a principle that underpins the *National commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders*.

Yet despite the apparent acceptance of the importance of this principle governments continue in most instances to act in a manner that conceives of it as aspirational rather than essential. The consequence of this is that Indigenous perspectives and concerns are able to be dismissed or outweighed when there is a contrary or competing set of interests.

This was emphasised by the decision of March 1999 by the Committee on the Elimination of Racial Discrimination in relation to the native title amendments. In addition to its concerns that the native title amendments breach Australia's obligations to act in a non-discriminatory manner and to provide equality before the law, the Committee expressed concern that:

> The lack of effective participation by Indigenous communities in the formulation of the amendments... also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention.[50]

In explaining the application of the Convention to Indigenous peoples the Committee had previously called on States Parties to:

> ensure that members of Indigenous groups have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are to be taken without their informed consent.[51]

The Committee confirmed to Australia that this requirement of informed consent was not merely aspirational but a positive obligation on States Parties to the Convention.[52]

As I state in my 1999 Native Title Report:

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[49] *ibid.*, para 547.

[50] Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia*, *op cit.*, para 9.

[51] Committee on the Elimination of Racial Discrimination, *General recommendation XXIII. Indigenous peoples*, UN Doc A/52/18, para 4d.

[52] Mr Van Boven, in Foundation for Aboriginal Islander Research Action, *Minutes of the 1323rd meeting of the Committee on the Elimination of Racial Discrimination*, www.faira.org.au/cerd/index.html, p43. This is the unofficial transcript of Australia's appearance before the Committee in March 1999.

> The gover ment's interpretation of the Convention's requirement of effective participation follows from what it saw as its role of striking a balance between all those whose interests were affected by the native title legislation...
>
> The Australian government's written and oral submissions (to the Committee) present Indigenous parties as but one of a series of parties with a stake in the legislation... In mediating an outcome between stakeholders the government gives Indigenous interests the same weight as the interests of miners, pastoralists, governments and other industries.
>
> The Committee responded to this by pointing out, in paragraph 6 of the decision, that the Convention requires that State parties balance the *rights* of different groups identifiable by race.[53] An appropriate balance based on the notion of equality is not between miners, pastoralists, fishing interests, governments and Indigenous people, but between the rights – civil, political, economic, cultural and social - of Indigenous and non-Indigenous titleholders.[54]

The principle of effective participation is integrally linked to the concept of equality before the law. This principle is also a manifestation of the broader principle of self-determination. As the Committee on the Elimination of Racial Discrimination has noted:

> The right to self-determination of peoples is a fundamental principle of international law... the implementation of the principle of self-determination requires every State to promote, through joint and separate action, universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations.[55]

The principle of self-determination is set out in Article 1 of the ICCPR and ICESCR:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3 of the Draft Declaration on the Rights of Indigenous Peoples is worded identically.

There are two features of this principle that I want to highlight in relation to its application to Indigenous peoples. First, the right of self-determination applies to all peoples and is separate from rights that provide recognition and protection to the cultural identity of minority groups, including Indigenous peoples.[56] It is also a principle that does not threaten the territorial integrity of sovereign states. In this regard the Committee on the Elimination of Racial Discrimination has distinguished between two aspects of the right of self-determination:

> In respect of self-determination of peoples two aspects have to be distinguished. The right of self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5(c) of the ICERD. In consequence, governments are to represent the whole population without distinction as to race, colour, descent, or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based on the principle of equal rights and exemplified by the liberation of peoples from colonialism and by prohibition to subject people to alien

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[53] See also Mr Aboul-Nasr, *ibid.*, p44.

[54] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, HREOC, Sydney, 1999.

[55] Committee on the Elimination of Racial Discrimination, *General Recommendation XXI – Self-determination*, UN Doc. A/51/18, paras 7,8.

[56] Such as the principles of non-discrimination and equality before the law in Articles 2 and 5 of CERD and Articles 2 and 26 of the ICCPR, and cultural rights under Article 27 of the ICCPR.

> subjugation, domination and exploitation.[57]

In November 1996 the Minister for Aboriginal and Torres Strait Islander Affairs announced that the government's Indigenous affairs policy would no longer be based on the principle of self-determination. In part, the justification put for this was an interpretation of the principle of self-determination that equates it solely with this external aspect. Instead, government policy is now based on the concept of 'self-empowerment.' This concept, which has no meaning in international law, is exemplified by the government's calls for Indigenous peoples to move beyond welfare dependency:

> self-empowerment enables Aborigines and Torres Strait Islanders to have a real ownership of (their) programs thereby engendering a greater sense of responsibility and independence... In this sense, self-empowerment varies from self-determination in that it is a means to an end – ultimately social and economic equality – rather than merely an end in itself.[58]

This misunderstands the scope and intent of the principle of self-determination. Self-determination cannot accurately be described as an end of itself. The right of self-determination is the right to make decisions and to control their implementation. As Dr Lowitja O'Donoghue has described it, 'self-determination is a 'dynamic right' under the umbrella of which Aboriginal and Torres Strait Islander peoples will continue to seek increasing autonomy in decision making.'[59]

In July 1998 Cabinet decided to persuade Canada, New Zealand and the United States to support the removal of the term 'self-determination' from the Draft Declaration on the Rights of Indigenous Peoples.[60] This move is inconsistent with one of the fundamental principles of the human rights system – the universality of human rights, i.e the application of the right of *all* people to self-determination. Ironically, it also goes against the clearly expressed aspirations of Indigenous peoples – the very thing that the principle of self-determination reinforces should be valued by nation States.

Reconciliation

We have now entered the final eighteen months of the term of the Council for Aboriginal Reconciliation. In May this year CAR released for discussion a draft document of reconciliation and three draft national strategies for reconciliation. These documents will be at the centre of debates about Indigenous policy development over the coming eighteen months.

Section 46C(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) provides that in the performance of my functions (which are centred on promoting awareness and discussion of the human rights of Indigenous Australians) I must have regard to the object of the *Council for Aboriginal Reconciliation Act 1991* (Cth). I intend to work collaboratively with CAR, ATSIC and Indigenous communities over the next eighteen months to promote an understanding of the importance of the recognition of the human rights of Indigenous people to the reconciliation process.

For reconciliation to be lasting and meaningful it must involve the full recognition of and

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[57] Committee on the Elimination of Racial Discrimination, *General recommendation XXI. Self-determination*, 1996, UN Doc A/50/18, para 9. See also para 11.

[58] Senator Herron, 9th Annual Joe and Enid Lyons Memorial Lecture, as quoted in ATSIC, *An analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 2nd edition, March 1999, www.atsic.gov.au/indigrights/five_a.htm

[59] *ibid*

[60] 'Downer fears phrase will split Australia', *The Age*, 22 August 1998.

respect for the human rights of Indigenous peoples. As Sir Gerard Brennan has stated, 'reconciliation is an obligation of justice, not a manifestation of benevolence.'[61] Reconciliation must include recognition of rights to equality, non-discrimination and effective participation. I maintain great optimism that the reconciliation process may deliver on these rights and consequently improve the livelihoods of many Indigenous Australians.

In order to do so, appropriate weight must be given to the aspirations and concerns of Indigenous Australians during this process. There can be no doubt as to what these aspirations are. Indigenous people have consistently called for the recognition of the full spectrum of our human rights. In the last decade alone such calls have been made in the Barunga statement, the Social Justice Package proposals, the Reconciliation Convention of 1997, the federal Constitutional Convention of February 1998, and most recently the Kalkaringi and Batchelor statements of the Combined Aboriginal Nations of Central Australia.

The Kalkaringi and Batchelor statements of August and November 1998 were made in the context of the Northern Territory Statehood debate. A Statehood Convention had been held in Darwin in March and April 1998, which adopted a proposed draft Constitution for the Territory as the basis for a movement to Statehood. The Legislative Assembly of the Northern Territory adopted this draft Constitution on 13 August 1998.

Indigenous people in the northern Territory have been highly critical of the process surrounding the Statehood debate. Many Indigenous organisations boycotted the Statehood Convention, and delegates who represented organisations that did not boycott the convention walked out before the final vote on resolutions.[62] Substantial criticism was made by Indigenous people of the outcomes of the Convention, as reflected in the revised draft Constitution. These criticisms were focused on the removal of provisions from the previous draft document which had proposed constitutionally entrenching land rights and the protection of sacred sites, providing special status and protection to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and entrenchment of the principle of Aboriginal self-determination through an act of Parliament.

In response to the adoption of the draft Constitution by the Legislative Assembly the Combined Aboriginal Nations of Central Australia met from 17-20 August 1998 on the land of the Gurindji people at Kalkaringi. They met on the anniversary of the Gurindji walk off at Wave Hill station,[63] and discussed issues of constitutional reform, statehood and governance.

Out of this meeting, attended by over 700 delegates, came a statement expressing the aspirations and concerns of the Combined Aboriginal Nations of Central Australia - the Kalkaringi statement.[64] The statement begins:

> The Aboriginal nations of Central Australia are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognised on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory.

On the Statehood issue, the statement indicates:

> 1. That we do not consent to the establishment of a new State of the Northern Territory

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[61] Brennan, G., 'Reconciliation' in (1999) 5(2) *University of NSW Law Journal Forum* 1, p3.

[62] See further: Pritchard, S., 'Constitutional development in the Northern Territory: The Kalkaringi Convention' (1998) 4(15) *Indigenous Law Bulletin* 12.

[63] See further: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1998*, HREOC, Sydney, 1999, chapter 1.

[64] The Kalkaringi statement is reproduced at: (1998) 4(15) *Indigenous Law Bulletin* 14. It can also be located on the internet at: <www.clc.org.au/clc/statehood/statement.htm>.

on the terms set out in the Draft Constitution adopted by the Legislative Assembly on 13 August 1998.

2. That we withhold our consent until there are good faith negotiations between the Northern Territory government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect.

The issue of Statehood was put to the people of the Northern Territory in a referendum in October 1998. It failed with 51.31% of people voting no. Following this, the Northern Territory Aboriginal Nations Convention on Standards for Constitutional Development was conducted at Batchelor in November 1998. The resolutions of this Convention – the Batchelor Statement - adopted the Kalkaringi statement as the basis for the discussions at the Convention and for the 'ongoing development of Indigenous policy on the content of the Northern Territory and Australian constitutions.'[65]

These statements represent the freely expressed aspirations of the Aboriginal Nations of Central Australia. They identify a range of issues that appropriately must be fully considered as part of the reconciliation process. They call for the recognition of the distinct rights of the Aboriginal peoples of the Northern Territory, including the following:

- Rights of self-determination and self-government, including recognition of the role of Indigenous governance structures and the direct Commonwealth funding of Indigenous organisations and communities;
- The recognition of Indigenous customary law;
- Protection in the Northern Territory Constitution of the rights of Aboriginal people to land, sacred sites and significant areas;
- Procedures to ensure effective levels of representation of Aboriginal people in the Northern Territory Parliament;
- The prohibition of discrimination and the full recognition of Australia's human rights obligations;
- Recognition of the right to equal access to essential services and infrastructure, and the appropriateness of adopting special measures for the provision of these services to people living in remote areas;
- The adoption of special measures for the immediate improvement of the social and economic conditions of Aboriginal people;
- The right to determine and control service delivery programs through adequately resources institutions;
- Recognition of the right of Aboriginal children to all levels of education, to Indigenous control of and the culturally appropriate delivery of educational services;
- Effective participation of Aboriginal people in the justice mechanisms of the Northern Territory, and the resourcing of community justice mechanisms;

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[65] Northern Territory Aboriginal Nations, Convention on Standards for Constitutional Development (the Batchelor Statement), Resolution 1. The Statement can be viewed at <www.clc.org.au/clc/statehood/intro.htm>

- Provision of interpreter services in legal and administrative proceedings; and
- The repeal of mandatory sentencing legislation.

I address a number of these issues during this report. These are the recently expressed aspirations of the Indigenous peoples of the Northern Territory. They emanate from the call for recognition of Indigenous rights based on the principles of equality, co-existence and mutual respect.

A reconciliation process which is based on anything less than negotiation over these principles will join proposals such as the Social Justice Package as an empty, unfulfilled commitment to social justice for *all* Australians.

Indigenous young people

As I stated earlier, the body of this report is focused on issues relating to young Indigenous people.

Indigenous youth comprise more than half of the total Indigenous population. They also comprise a larger percentage of the total youth population than Indigenous people are for the total population. The relatively young age structure of the Indigenous population will mean that over the next decade there will be a substantially higher proportion of Indigenous people entering working age.

Consequently, issues that face Indigenous children and young people today, which ought to be a significant focus of Indigenous policy debates, will also raise significant policy challenges for Indigenous adults over the coming decades.

Prior to my appointment as Social Justice Commissioner, the Office of the Social Justice Commissioner initiated an Indigenous Young Peoples Forum. This forum took place with 60 Indigenous young people from across the country in early August 1999. Over two days these 60 young people, aged from 15 to 29 years, discussed a range of issues that affect their daily lives ranging from identity, leadership and community, through to juvenile justice, education, international law and human rights, and reconciliation.

I left the Forum with great confidence about the future of Indigenous peoples in this country. Their perspectives across the full spectrum of issues were insightful and considered. They demonstrated their commitment and dedication to their communities, and their pride in being Indigenous.

I also took from the Forum an increased understanding of the perspectives of Indigenous young people and the issues that they face. These people are experts on what it is like to live as an Indigenous young person in Australia at the turn of the century. In writing this report I have listened to their voices and their priorities. This is reflected in the content of this report.

Chapter 2 examines the extent of Indigenous disadvantage from the perspective of our future – our young people. It provides a profile of Indigenous people aged 15-29 years. It also provides human rights justifications for redressing the disadvantage faced by Indigenous youth – through the appropriate adoption of programs that recognise cultural difference, as well as the adoption of special measures.

Chapter 3 then considers the issue that the participants in the Indigenous Young People's Forum considered most important – identity. This chapter considers why Indigenous identity is important, from a youth perspective, as well as why it is an issue of human rights and social

justice.

Chapter 4 examines the debate surrounding the abolition of bilingual education programs in the Northern Territory. This chapter examines the principles of bilingual education and relates them to Australia's human rights obligations. Rights to education, language, respect for cultural difference, self-determination and native title are all raised by current and ongoing debates nationally and internationally about bilingual education.

Finally, chapter 5 considers the disproportionate involvement of Indigenous youth in the juvenile justice and criminal justice systems. The challenge of reducing this over-representation has been much discussed, from the Royal Commission into Aboriginal Deaths in Custody through to the National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, or *Bringing them home*. This chapter examines a series of national standards and benchmarks that emerge from numerous reports and Australia's international human rights obligations. It applies these principles and benchmarks to the mandatory sentencing legislation in the Northern Territory and Western Australia, as well as to alternative policy approaches.

One factor that emerges from these chapters is the inter-connectedness of issues faced by Indigenous young people. There is, for example, an integral link between the disadvantage of Indigenous young people and their over-representation in the criminal justice system. Similarly, education is crucial in redressing disadvantage and reducing over-representation in criminal processes. Also entwined with these links is the imperative for policies and programs to be designed and delivered with Indigenous involvement, and to be culturally appropriate. They must recognise and protect the distinct identity of Indigenous young people.

Conclusion

The disadvantage faced by Indigenous Australians continues despite a much greater awareness of, and international developments in, the application of human rights standards to Indigenous peoples. The Social Justice Commissioner's office has played, and continues to play, a significant role in this regard and I would like to pay tribute to the efforts of my predecessors in the position.

Dr Mick Dodson, the first Social Justice Commissioner, set the highest standards of advocacy for the human rights of Australia's Indigenous peoples and his achievements are lasting. Zita Antonios, who filled the role in an acting capacity for eighteen months, maintained this role in a period of intense public debate, increased workloads and great change. Both are to be warmly congratulated for their efforts. I have inherited from them a strong legacy from which to continue to advocate for the rights of Indigenous Australians.

It is the role of the Social Justice Commissioner's office to seek to ensure that the human rights of Indigenous Australians are recognised and fully realised in order that we may one day enjoy equally the benefits of Australian society. Full and proper debates on these issues are thus essential, and for almost a decade Indigenous issues have been at the forefront of public debate. This has been largely due to the recognition of native title in the High Court's decisions in *Mabo* and *Wik*; as well as a result of the National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, or *Bringing them home*.

Unfortunately, the public debates on these issues have often been divisive, pitting Australian against Australian, scape-goating Indigenous people as somehow being 'privileged' and enjoying 'special treatment' to that of the general population. The reality could not be further from the truth. It is my role and my duty to pursue and report on this truth. Social justice demands no less.

Chapter 2: Indigenous young people and human rights

Across every measurement of socio-economic status and well-being, and across all age groups, geographical circumstances and genders, Australia's Indigenous people are severely disadvantaged, and disproportionately so when compared to the rest of Australian society. The first part of this chapter provides a profile of Australia's Indigenous young people and details the extent of the disadvantage that they face. There are lessons to be learnt from this profile. The most immediate lesson relates to the young age structure of the Indigenous population. The disadvantage faced by Indigenous young people today has the potential to increase and further entrench the disparity between Indigenous and non-Indigenous Australians over the coming decades unless greater effort is made now to reduce the inequality that they face. The second part of this chapter examines the human rights justifications, and requirements, for redressing this disadvantage. To redress inequality does not constitute 'reverse racism' or discrimination against non-Indigenous Australia. Instead, it is to provide justice or 'simply, to set right'.[66]

Part 1 – A profile of Indigenous youth

I am grateful to Ms Kate Ross of the Australian Bureau of Statistics and Mr Tony Barnes of the Co-operative Research Centre for Aboriginal and Tropical Health at the Menzies School of Health Research for preparing the material on which this profile of the Indigenous youth population is based. In this profile youth is taken to be aged 15-29 years unless otherwise indicated. This profile is based on a presentation by Ms Ross and Mr Barnes at the Indigenous Young People's Forum conducted by the Human Rights and Equal Opportunity Commission at Tranby College, Sydney on 5–6 August 1999.[67] It comprises analysis of data collected by the Australian Bureau of Statistics (ABS), principally through the five-yearly Census of Population and Housing (herein the Census), and the National Aboriginal and Torres Strait Islander Survey (herein NATSIS), and draws on recent analysis of this data by the ABS and other organisations.

Size of the Indigenous youth population

The most recent Census, conducted in 1996, recorded 98,146 Indigenous people aged 15-29 years. Indigenous youth comprised 27.8%, or more than one in four, of the total Indigenous population recorded in the Census. Table 1 shows the increase in the Indigenous population in Census counts since 1966. Table 2 shows that the 1996 Census figure was an increase of 23.7% on the number of Indigenous people aged 15-29 years who identified as Indigenous in the previous Census in 1991. Table 2 also shows, however, that this increase in the Indigenous youth population was less of an increase than that for the total Indigenous population in the same period.[68]

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[66] The Hon. M Wooldridge, Minister for Health and Aged Care, *Aboriginal health: The ethical challenges*, Speech, Caroline Chisolm Centre for Health Ethics, 6 August 1998, <www.health.gov.au/archive/mediarel/1998/mwsp980806.htm>, p3.

[67] The full paper of their presentation can be viewed at the web-site of the Aboriginal and Torres Strait Islander Social Justice Commissioner: Ross, K. and Barnes, T., *Painting by numbers - creating a statistical picture of Indigenous youth in Australia*, Human Rights and Equal Opportunity Commission, Sydney, 1999, <www.hreoc.gov.au/ social_justice/index.html>

[68] Source: Australian Bureau of Statistics, *1996 Census of Population and Housing: Indigenous profile*, ABS Cat 2020.0, ABS, Canberra, 1998, Table 103. The reasons for the substantial increase in those people who identify as Indigenous in the Census are not entirely clear. For further information on issues relating to identification see Council for Aboriginal Reconciliation and Centre for Aboriginal Economic Policy Research, 'Demographics and Dollars' in *Towards a benchmarking framework for service delivery to Indigenous Australians*, Commonwealth of Australia, Canberra, 1998; Ross, K., *Occasional Paper: Population Issues, Indigenous Australians, 1996*, Australian Bureau of Statistics, 1999; Ross, K. and Barnes, T., *ibid*.

Table 1: Indigenous Census counts - 1966-96[69]

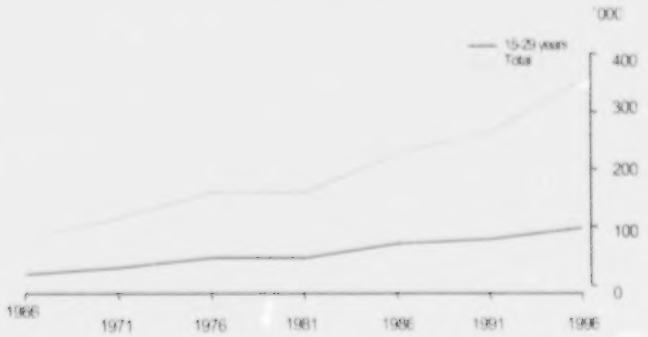
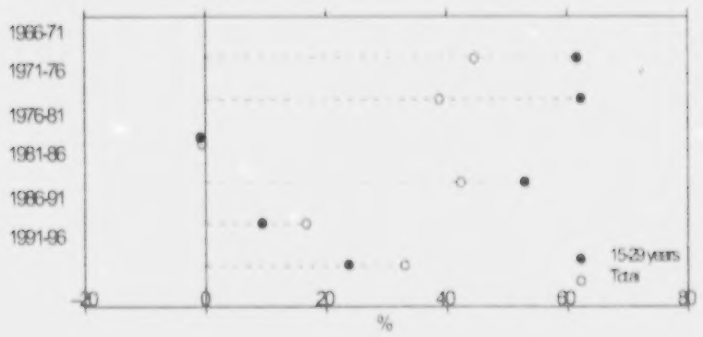


Table 2: Change in Indigenous Census Counts – 1966-96[70]



The ABS adjusts the Census figures for the estimated number of people missed from the census process in order to produce more accurate figures of the size of the population. This is referred to as the estimated resident population (ERP). The estimated resident population for Indigenous youth in 1996 was 108,392. This is 10% higher than the figure for the Census count.[71]

Age structure of the Indigenous population

Table 3 shows the different age structures of the Indigenous and total populations, based on the estimated resident population for each group. The age structure of the total population is that of a highly developed country, with fewer young people and a 'bulge' in the middle age groups. This reflects low birth rates and improving mortality rates. In contrast, the age structure of the Indigenous population is typical of an underdeveloped country with more children and young

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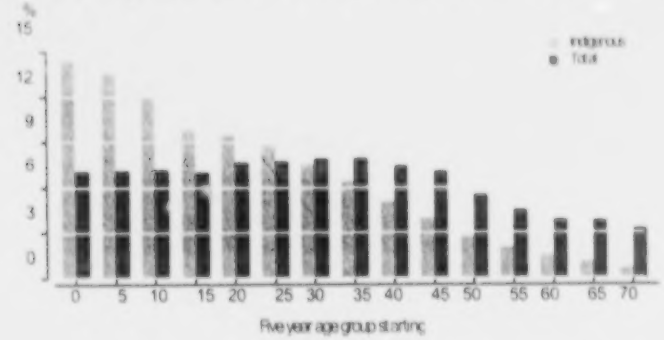
[69] Sources: Commonwealth Bureau of Census and Statistics, *The Aboriginal population of Australia: Summary of characteristics, 30 June 1966*, CBCS ref. 2.23, CBCS, Canberra, 1969, p9; Australian Bureau of Statistics, *1996 Census of Population and Housing. Indigenous profile*, *op.cit.*, Table I03; Australian Bureau of Statistics, 1971-1991 Census data, unpublished. Note: 1966 figures exclude Torres Strait Islanders. 1986, 1991 and 1996 figures exclude overseas visitors.

[70] *ibid.*

[71] Australian Bureau of Statistics, Experimental Estimates of the Aboriginal and Torres Strait Islander Population 30 June 1991 – 30 June 1996, ABS cat. 3230.0, ABS, Canberra, 1998, p10.

people and few old people. This reflects relatively higher fertility and, to a lesser extent, higher mortality rates.

Table 3: Age structure of Indigenous and total Australian populations - 1996[72]



Nationally, Indigenous people constitute 2.1% of the total Australian population. By comparison, Indigenous people aged 15-29 years represent 2.6% and Indigenous children aged 0-14 years 3.9% of the total population for those age groups.

The higher proportion of Indigenous children and youth reflects the younger age structure of the Indigenous population when compared to the non-Indigenous population.[73] This young age structure is also reflected in the median age of the Indigenous population, as recorded in the 1996 Census.[74] The median age for the total Indigenous population was 20 years, compared to 33 years for the non-Indigenous population. For Indigenous males the median age was 18 years, compared to 33 years for non-Indigenous males, and for Indigenous females it was 21 years compared to 34 years for non-Indigenous females.[75]

This young age structure is a significant factor that needs to be considered in any discussion of policies affecting Indigenous people.

Table 4 shows the distribution of Indigenous people across each of the states and territories as a percentage of the total population. Indigenous people are a minority in every state and territory. The Northern Territory is the only state or territory where Indigenous people are a sizable proportion of the population, accounting for 32% of the youth population and 29% of the total population. In all other states and territories Indigenous people represent 4% or less of both the youth and total populations. Table 4 reflects the young age structure of the Indigenous population, with Indigenous youth representing a higher proportion of the total youth population in each state and territory than Indigenous people across all age groups.[76]

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[72] Note: Estimated resident population. Sources: *ibid*.; Australian Bureau of Statistics, *Australian Demographic Statistics – June Quarter 1997*, ABS cat. 3101.0, ABS, Canberra, 1998, p16.

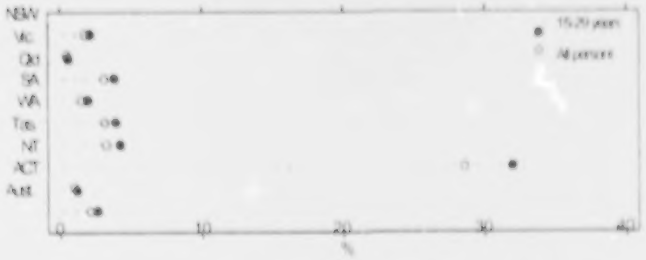
[73] The higher percentage of Indigenous children also reflects higher fertility levels amongst Indigenous women. Sources: *ibid*.

[74] Note: these figures exclude Torres Strait Islanders.

[75] Australian Bureau of Statistics, *Population distribution, Indigenous Australians*, cat. 4705.0, ABS, Canberra, 1997, p6.

[76] Source: *ibid*.

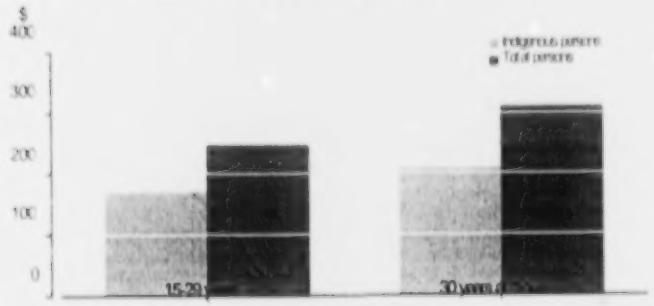
Table 4: Indigenous population as a percentage of all persons by state and territory - 1996[77]



Income

In the 1996 Census the median income for Indigenous people aged 15-29 years was $171 per week.[78] This is two-thirds of the median income for the total population aged 15-29 years. Median income tends to be lower for people in younger age groups, due to higher levels of participation in the education system. Table 5 indicates, however, that while median income for Indigenous and non-Indigenous people rises with age, the disparity between Indigenous and non-Indigenous income levels does not decrease.[79]

Table 5: Median weekly income - 1996[80]



Unemployment

The unemployment rate for Indigenous youth in 1996 was 28.6%.[81] Table 6 demonstrates that this was more than double the corresponding rate for all youth. While the unemployment rate declines for adults aged 30 years and over, the rate of unemployment among Indigenous Australians remains more than double that of all Australians. Indeed, the unemployment rate for Indigenous people over the age of 30 is higher than the unemployment rate for the total youth

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77 Note: Estimated resident population. Sources: *ibid*

78 This means that 50 per cent of Indigenous youth earn less than $171 per week. Income in the Census was taken to include all wages, salary and forms of government payments.

79 Source: Australian Bureau of Statistics, unpublished 1996 Census data.

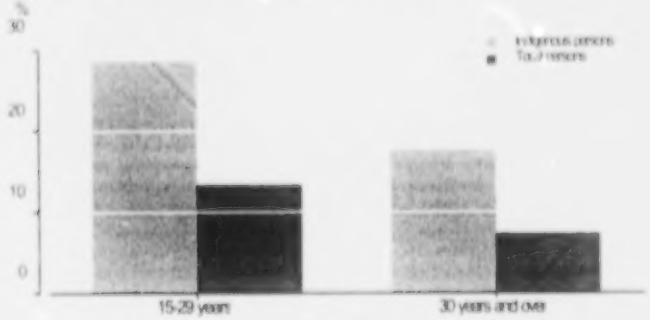
80 Ibid.

81 The figure for unemployment excludes people participating in the Community Development Employment Program (CDEP).

population.[82]

The main difficulties reported by Indigenous youth in finding a job were a perceived absence of jobs, either at all, in the local area or in a suitable line of work, transport problems in getting to work, or work being too far to travel, and insufficient education, training or skills.[83] For Indigenous youth who wanted to work but were not actively seeking work, the main reason given for not looking was study commitments. Significant additional reasons for females were family commitments and a lack of childcare facilities.[84]

Table 6: Unemployment rate - 1996[85]



Housing

Housing stress is an important indicator of environmental health and well-being. In general, the higher the number of residents in a house, the greater use of water and sewage facilities and the higher the chance of equipment and utility breakdown. In addition, severe overcrowding may hinder possibilities for further study.

Table 7 refers to the percentage of households with more than 10 people living in them. It shows that 9% of Indigenous people aged 15-29 years live in households with more than 10 residents compared to 0.4% of all young people. For Indigenous persons 30 years and over, this percentage of people living in overcrowded conditions is reduced to nearly 7%. However, only 0.1% of all persons aged over 30 years live in overcrowded conditions.[86]

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82 Source: Australian Bureau of Statistics, unpublished 1996 census data.

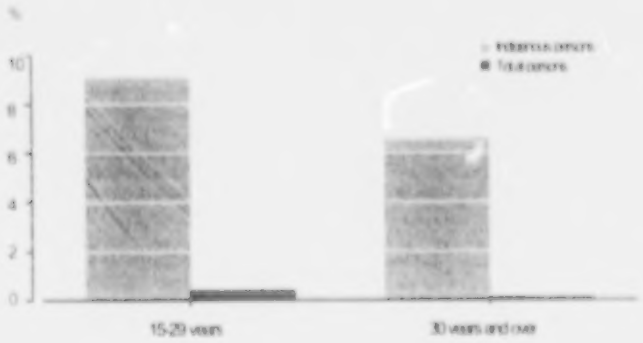
83 Australian Bureau of Statistics and the Centre for Aboriginal Economic Policy Research, *National Aboriginal and Torres Strait Islander Survey: Employment outcomes for Indigenous Australians*, ABS cat. 4199.0, ABS, Canberra, 1996, p50. This analysis is based on statistics from the 1994 NATSIS.

84 Source: Australian Bureau of Statistics and the Centre for Aboriginal Economic Policy Research, *National Aboriginal and Torres Strait Islander Survey: Employment outcomes for Indigenous Australians*, ABS cat. 4199.0, ABS, Canberra, 1996, p52.

85 Source: Australian Bureau of Statistics, unpublished 1996 Census data.

86 Ibid.

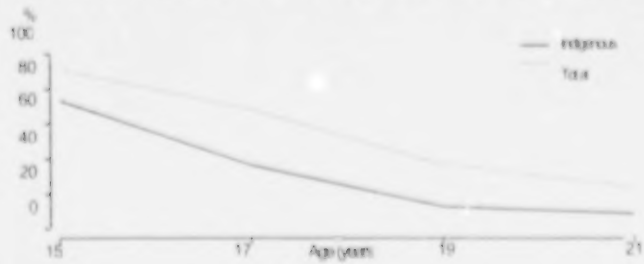
Table 7: Households with more than 10 persons - 1996[87]



Secondary education

Table 8 indicates that Indigenous people aged 15-21 years have lower participation rates in the formal education system than the rest of the population. Census figures show that 73.7% of Indigenous 15 year olds were in full-time education in 1996. This compares with 91.5% of all 15 year olds. At older ages, the gap between Indigenous participation and that of the rest of the population increases. By the age of 19, an age at which involvement in tertiary education might be expected, only 12% of Indigenous people were in full-time education. This is one-third of the rate for the total population at age 19.[88]

Table 8: Participation of 15-21 year olds in full time education - 1996[89]



Recent analysis by the ABS of education and training statistics indicates that Indigenous people are far more likely than others who also have English as a first language to be at lower literacy levels.[90] Indigenous people are also far less likely than other Australians, including those whose

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87 Note: Persons enumerated in family or lone person households. Source: Australian Bureau of Statistics, unpublished 1996 Census data.

88 Source: Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander Australians: A statistical profile from the 1996 Census', in *Year Book Australia 1999*, cat. 1301.0, ABS, Canberra, 1999, p106.

89 Statistics are for persons attending an educational institution full-time as a percentage of all persons of that age group. Source: *ibid*.

90 Australian Bureau of Statistics, *Education and Training in Australia, 1998*, ABS cat. 4224.0, ABS, Canberra, 1999, p21. Note: This analysis is based on data from the 1996 Survey of Aspects of Literacy. The survey was based on a small sample of Indigenous people and did not include respondents in remote and sparsely settled areas. Consequently, almost all Indigenous respondents are recorded as speaking English as their first language.

first language is not English, to have a post-school qualification and far more likely to have left school before completing the highest level of secondary school available.[91]

Data from the 1994 NATSIS shows that among Indigenous people aged 45 years and over, 81% did not complete year 10 education. This compares with 41% of 25-44 year olds, and 34% of 15-24 year olds.[92] This data indicates that Indigenous involvement in the education system to year 10 has improved over the past three generations. Indigenous people aged 15-24 years are better prepared for further education or work than previous generations.

Tertiary education

In 1997 Indigenous students enrolled in higher education courses accounted for 1.1% of the total student population. Table 9 demonstrates that Indigenous students were more likely to be studying courses in the arts, humanities, social sciences and education than non-Indigenous students. They were far less likely to be enrolled in courses such as business, administration and economics, engineering and surveying, and science.[93]

Table 9: Field of study for higher education students - 1997[94]

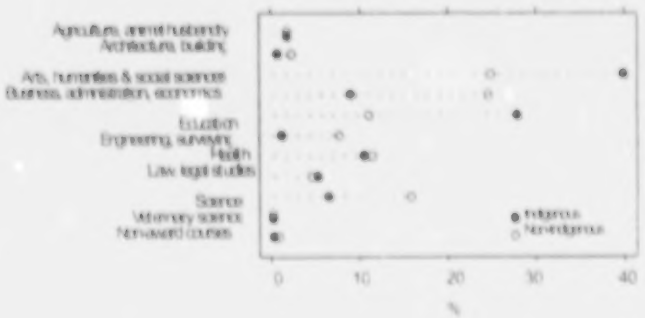

Table 10 indicates that Indigenous students were less likely to be enrolled in bachelor or higher degree courses than non-Indigenous students. However, this does not necessarily indicate disadvantage in the tertiary sector as nearly one in five Indigenous higher education students were enrolled in bridging courses for further study.[95] It is feasible that enabling courses have been necessary as a result of poor secondary schooling and, consequently, that this data may reflect a turning around of educational prospects for Indigenous students.

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[91] *ibid*, p20. Note: This analysis is based on data from the 1997 Survey of Education and Training Experience. The Survey included a small sample of Indigenous people resident in non-remote areas.

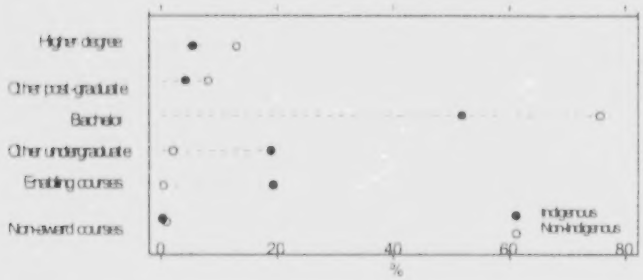
[92] Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Survey 1994: Detailed findings. ABS cat 4190.0. ABS Canberra, 1995, p41.

[93] Australian Bureau of Statistics. *Education and training in Australia 1998, op cit*, pp58-59.

[94] *ibid*, p59.

[95] *ibid*.

Table 10: Higher education students, Level of qualification - 1997[96]

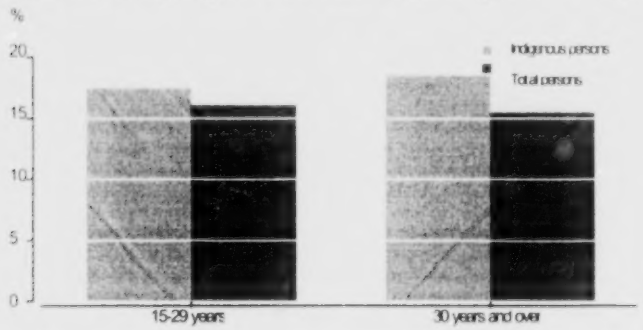


In 1996, similar numbers of Indigenous females and males held higher degrees (161 females and 170 males). However, around twice as many Indigenous females had postgraduate diplomas (396 females compared to 195 males) as well as undergraduate diplomas (1450 females and 630 males). Indigenous females were one and a half times more likely to have a bachelor degree than Indigenous males (1932 females and 1311 males).[97]

Language and culture

Table 11 indicates that in the 1996 Census a slightly higher proportion of Indigenous people aged 15-29 years reported speaking a language other than English at home than other young people. The proportion of speakers of other languages declined with age for the total population but increased for the Indigenous population.[98] For the total population, this probably reflects the learning of English by immigrants and subsequent disuse of the first language. For Indigenous Australians, it is more likely to reflect more extensive use of traditional language by older Indigenous people and declining use by Indigenous young people. This factor, combined with the young age structure of the Indigenous population, places significant strain on older Indigenous people for the maintenance and passing down to younger generations of traditional cultural practices and languages.

Table 11: Languages other than English spoken - 1996[99]



[96] Source: *ibid.*

[97] Australian Bureau of Statistics, 1996 Census of Population and Housing: Indigenous profile, op cit., Table 108.

[98] Source: Australian Bureau of Statistics, unpublished 1996 census data.

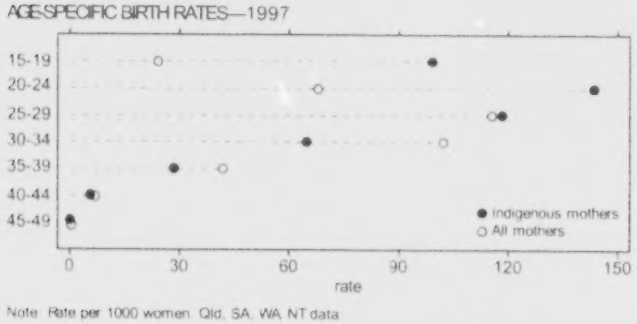
[99] Source: Australian Bureau of Statistics, Unpublished Census data.

The 1994 NATSIS data revealed that over two-thirds of Indigenous 15-24 year olds had participated in some form of cultural activity over the last 12 months. The participation rate increased with age, with almost three-quarters of persons aged 25 and over attending a cultural activity. Similarly, 70% of Indigenous 15-24 year olds recognised a homeland, whether or not they were living there now, in comparison to 79% of persons aged over 25.[100]

Birth rates

Data of sufficient quality about births to Indigenous mothers are limited to Queensland, South Australia, Western Australia and the Northern Territory. Table 12 indicates that birth rates for Indigenous women aged between 15 and 24 were 2-3 times higher than for the total female population of that age group. Conversely, birth rates at ages over 30 were much lower than for the total population.[101] This data reinforces that relating to unemployment discussed earlier, which indicated that the lack of childcare is a significant barrier identified by young Indigenous women for not actively seeking work.[102]

Table 12: Age-specific birth rates - 1997[103]



Note: Rate per 1000 women. Qld, SA, WA, NT data.

Source: *ABS 1998d pp73-76, unpublished experimental indigenous population projections, low series for 1997 and unpublished total population estimates.*

Mortality

Data of sufficient quality about deaths of Indigenous people are only available for South Australia, Western Australia and the Northern Territory. Table 13 shows that in 1997, 15.3% of all deaths of Indigenous people occurred in the 15-34 age group. This compares to only 3.5% of deaths of non-Indigenous people in the same age group.[104] Put differently, death rates for Indigenous males and females in the 15-24 year age group were 2-3 times higher than for non-Indigenous people in the same age group and nearly 5 times higher in the 25-34 year age group. Indeed Indigenous people aged 25-34 have death rates which are higher than the death rate for 45-54 year old non-Indigenous people.[105]

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[100] Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Survey: Australia's Indigenous Youth, ABS cat 4197.0, ABS, Canberra, 1996, pp2-3.

[101] Source: Australian Bureau of Statistics, *Births, Australia, 1997*, cat. 3301.0, ABS, Canberra, 1998, pp73-76.

[102] Australian Bureau of Statistics and Centre for Aboriginal Economic Policy Research, National Aboriginal and Torres Strait Islander Survey: Employment Outcomes for Indigenous Australians, *op cit*, p52.

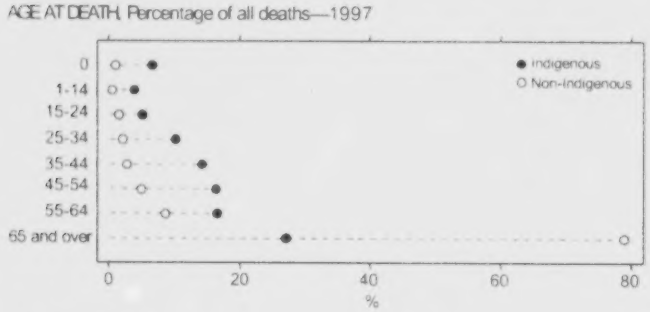
[103] Note: Rate is per 1000 women, based on data for Queensland, South Australia, Western Australia and the Northern Territory. Source: Australian Bureau of Statistics, *op. cit.*, pp73-76; Australian Bureau of Statistics, Unpublished experimental Indigenous population projections; and unpublished total population estimates.

[104] Australian Bureau of Statistics, *Deaths, Australia, 1997*, ABS cat 3302.0, ABS, Canberra, 1998, pp49-51.

[105] Australian Bureau of Statistics and Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, ABS cat 4704.0, ABS, Canberra, 1999, p132.

The most recent data suggests that, in the absence of improvement in mortality rates, at age 15, Indigenous males have a remaining life expectancy of 43.9 years and Indigenous females, a further 48.5 years. By comparison, non-Indigenous males and females must reach age 34 before their expected remaining years of life are the same as that expected for Indigenous people aged 15.[106]

Table 13: Age at death, Percentage of all deaths - 1997[107]



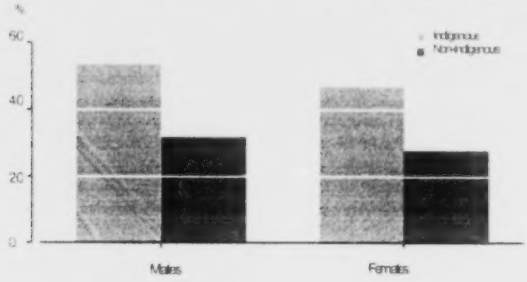
Note: SA, WA, NT data
Source: *ABS 1998e*

Risks to Health

The National Health Survey of 1995 revealed behavioural patterns that leave Indigenous youth more vulnerable to ill health than non-Indigenous youth.

Table 14 reveals that Indigenous young people are far more likely to smoke than non-Indigenous young people. Of those aged 18-24 years 53.5% of Indigenous males were current smokers compared to 31.8% of non-Indigenous males. For females, 46.9% of Indigenous females were current smokers compared to 27.7% of non-Indigenous females.[108]

Table 14: Current smoker, 18-24 years - 1995[109]



[106] Australian Bureau of Statistics, Deaths, Australia, 1997, op cit pp54-55; Australian Bureau of Statistics, Experimental projections of the Aboriginal and Torres Strait Islander Population 30 June 1996 – 30 June 2006, ABS cat 3231.0, ABS, Canberra, 1998, pp58-59.

[107] Note: Western Australia, South Australia and Northern Territory data. Source: Australian Bureau of Statistics, *Deaths, Australia, 1997, op.cit.*, pp49-51.

[108] Australian Bureau of Statistics, National Health Survey: Aboriginal and Torres Strait Islander Results, Australia, ABS cat 4806.0, ABS, Canberra, 1999, p37.

[109] Source: *ibid.*

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Patterns of alcohol consumption were quite different for Indigenous and non-Indigenous males. In the week prior to being surveyed a higher proportion of Indigenous males aged 18-24 years reported that they did not consume alcohol (51.3% compared to 40.1% non-Indigenous males). However, of those who did consume alcohol, a higher proportion of young Indigenous males consumed at a medium or high risk level than non-Indigenous males (26.1% compared to 17.9%). There was, however, almost no difference in risk based or stated alcohol consumption of Indigenous and non-Indigenous females.[110]

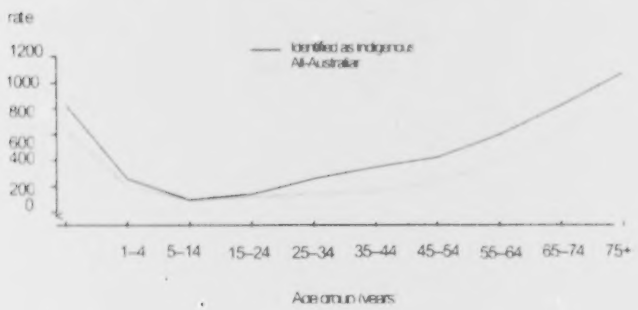
Indigenous people aged 18-24 years also reported lower levels of physical activity than other young people. 36% of Indigenous males and 41% of Indigenous females reporting that they undertook no exercise. This compares with 23.6% and 27.1% of non-Indigenous males and females respectively.[111]

A higher proportion of Indigenous people aged 15-24 assessed their own health as fair or poor (11.6%) than non-Indigenous young people (8.7%). Despite this, Indigenous young people were less likely to have acted on this and taken some health-related action in the fortnight prior to being surveyed (60.8% of Indigenous youth compared to 70.6% of non-Indigenous youth).[112]

Hospitalisation

Tables 15 and 16 demonstrate the rate of hospitalisation of Indigenous males and females, compared to the rest of the population. These statistics underestimate the actual rate of hospitalisation of Indigenous people. This is the result of problems in data collection. The overall patterns revealed by these statistics are, however, still revealing. The data collected is for hospital separations, which includes discharge from hospital, transfers to other facilities or the death of the patient.[113]

Table 15: Hospital separations, All causes excluding dialysis, Males[114]



[110] *ibid*, p38.

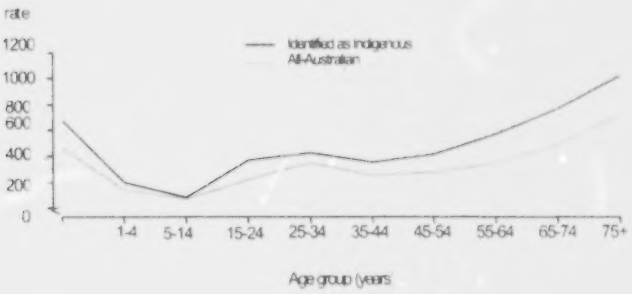
[111] *Ibid*, p39.

[112] *ibid*, pp15, 28.

[113] See further: Australian Bureau of Statistics and Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, *op cit*, pp108-110.

[114] Note: Based on data from public and private hospitals except in the Northern Territory (public hospitals only) for 1996-97. Rates of separation are per 1,000 of the population. Source: *ibid*., p112.

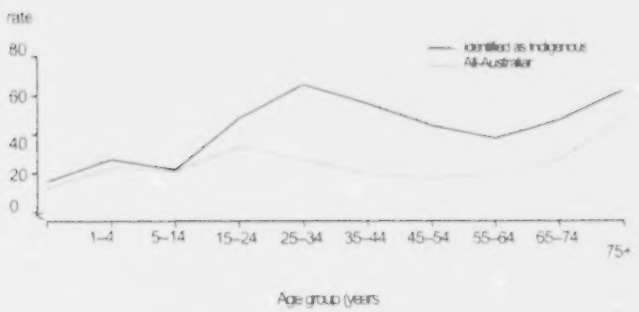
Table 16: Hospital separations, All causes excluding dialysis, Females[115]



For both Indigenous males and females the main reasons for hospital separations were injury, respiratory disease, digestive disease and dialysis. In addition, pregnancy and childbirth was a major reason for Indigenous females, particularly in the 15-24 years age group.[116] At all ages hospital separation rates for Indigenous males and females are higher than for non-Indigenous males and females. The differences were smallest among children aged 5-14.[117]

One oft-reported cause of hospitalisation is injury. Injury includes transport accidents, accidental falls, self-inflicted injury, attempted suicide, injury purposely inflicted by others and other accidents. Overall, Indigenous people have about twice as many separations due to injury as the total population.[118] Tables 17 and 18 show the extent of hospitalisations due to injury.

Table 17: Hospital separations, Injury, Males[119]



[115] *Ibid.*, p113

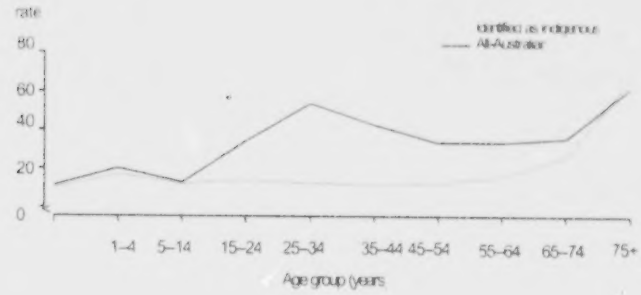
[116] *Ibid.*, p111

[117] *Ibid.*, p112

[118] *Ibid.*, pp113-14

[119] Note: Based on data from public and private hospitals except in the Northern Territory (public hospitals only) for 1996-97. Rates of separation are per 1,000 of the population. Source: *ibid.*, p113

Table 18: Hospital separations, Injury, Females[120]

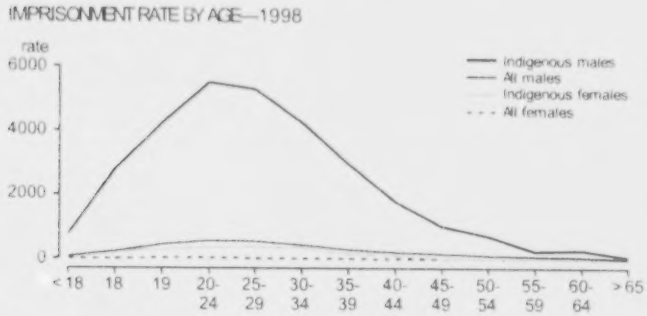


Hospital separations due to injury were highest for the 25-34 year old age group, for both males and females. Rates for Indigenous males in this age group were around 2.5 times those for all males. For Indigenous females the rate was more than 4 times the rate for all females. Intentional injury inflicted by others was the most common recorded type of injury for Indigenous people. Separation rates for intentional injury for Indigenous males were nearly 7 times higher than for non-Indigenous males and 20 times higher for Indigenous females. However, this data should be treated with caution as the cause of some injuries, such as domestic violence, may be seriously under-reported and some injuries of this type may be classified elsewhere.[121]

Contact with the criminal justice system

Table 19 reveals striking differences in imprisonment rates between Indigenous prisoners and the total population.

Table 19: Imprisonment rate by age - 1998[122]



Note: Rate per 100,000 population
Source: ABS 1999d

Results from the 1998 National Prisoner Census show that 18.8%, or nearly 1 in 5 prisoners, were recorded as Indigenous on the night of the Prisoner Census. Imprisonment rates for

[120] *ibid*

[121] *ibid*., pp114-115

[122] Note: Rate per 100,000 population. Source: Australian Bureau of Statistics, *Prisoners in Australia, 1998*, uncatalogued, ABS, Canberra, 1999, pp14, 65

Indigenous males are 12 times higher than the rate for all males, and the rate for Indigenous females 14 times higher than for all females. Rates are higher for Indigenous people across all age groups.[123]

Nationally, 93% of all Indigenous prisoners, and 94% of all prisoners were male. There are extremely high rates of imprisonment for Indigenous men aged 20-29. 1 in 20 young Indigenous men were in prison on census night 1998. Rates for all males are also highest for 20-29 year olds but represent 1 in 200 of all young men.[124]

The proportions of Indigenous prisoners who were imprisoned because they were serving a sentence, (86% for males and 83% for females) or were in prison awaiting trial or sentencing[125] (14% for males and 17% for females) were the same as rates for the total population.[126]

Indigenous prisoners, both male and female, were more likely to have been previously imprisoned under sentence as an adult. For males, 78% of Indigenous prisoners had a known prior adult imprisonment compared to 63% of all male prisoners. Similarly, for females, 70% of Indigenous prisoners had been previously imprisoned in contrast to only 55% of all female prisoners.[127]

The effect of imprisonment on future educational and employment prospects is difficult to quantify. However analysis of data from the NATSIS showed that arrest in the previous five years (as distinct from being imprisoned) reduced the probability of being in employment by one-half for both males and females.[128]

Indigenous prisoners have a different offence profile to the rest of the prisoner population. Table 20 demonstrates that for Indigenous males, the most common offence is assault. It accounts for 1 in 4 Indigenous male prisoners, twice the proportion of all male prisoners imprisoned for assault. A much smaller proportion of Indigenous males were imprisoned for drug offences than for all males.[129]

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[123] *ibid.*, pp12, 14, 62-63, 65.

[124] *ibid.*, pp14, 65.

[125] This also includes people being held under a deportation order.

[126] Australian Bureau of Statistics, *Prisoners in Australia, 1998*, *op cit.* pp19, 62, 71, 112.

[127] *ibid.*, pp17, 66.

[128] Australian Bureau of Statistics and Centre for Aboriginal Economic Policy Research, *National Aboriginal and Torres Strait Islander Survey: Employment Outcomes for Indigenous Australians*, *op cit.*, p86. See also the discussion of this issue in the introductory chapter and Hunter, B. and Borland, J. 'The effect of arrest on Indigenous employment prospects' (1999) 45 *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research.

[129] *ibid.*, pp17, 66.

Table 20: Selected offences/charges, Males, Proportion of all prisoners - 1998[130]

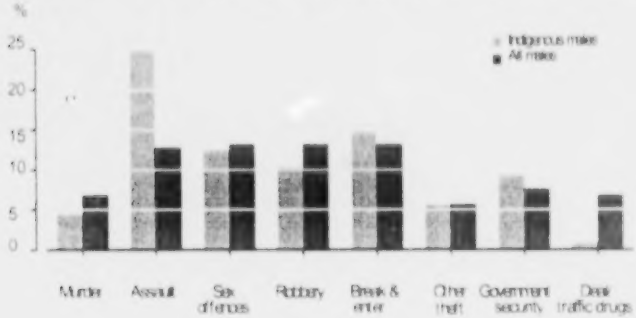
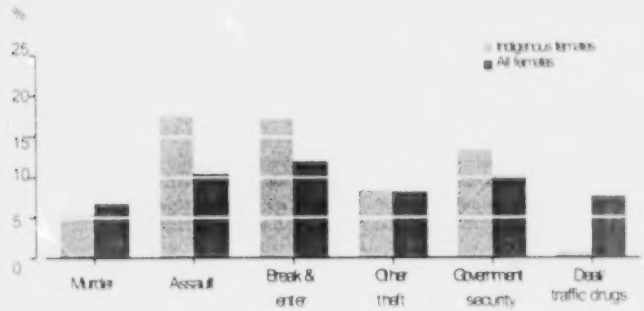


Table 21 shows that the most common offences for Indigenous female prisoners were assault and break and enter. Indigenous females were also far less likely to be imprisoned for drug offences than all females.

Table 21: Selected offences / charges, Females, Proportion of all prisoners - 1998[131]



Indigenous prisoners, on average, were serving slightly shorter sentences than other prisoners. Indigenous males had an average sentence of 3.7 years in comparison to 4.7 years for all males and Indigenous females had an average sentence length of 2.4 years, compared to 3.1 years for all females.[132] This suggests that Indigenous people are imprisoned for less serious offences.

Part 2 – Redressing disadvantage: The human rights dimension

> Clearly Indigenous Australians have not yet achieved the levels of health, education, employment and economic independence enjoyed by most Australians... The Australian community faces a tremendous challenge over the next few years in making real progress in bridging the gap of Indigenous disadvantage in Australia. The goal is clear. We must raise the standard of living and the quality of life for all Indigenous Australians to the level routinely expected by all other members of society...[133]

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[130] Note: Includes sentenced and unsentenced prisoners. Source: Australian Bureau of Statistics, *Prisoners in Australia, 1998*, *op.cit.*, pp23, 54, 69.

[131] Note: Includes sentenced and unsentenced prisoners. Source: *ibid.*, pp23, 54, 69.

[132] *ibid.*, pp27, 71.

[133] The Hon P. Reith, Minister for Employment, Workplace Relations and Small Business, *Speech – Launch of Indigenous Employment Policy*, Parliament House, 25 May 1999.

The profile in part 1 demonstrates the distinct disadvantage faced by Indigenous youth. They do not enjoy a position of equality within Australian society. The young age structure of the Indigenous population also ensures that the disadvantage faced by Indigenous people in Australia is not going to 'sort itself out' or simply go away. Indeed, the disadvantage faced by Indigenous youth today has the potential to increase and further entrench the disparity between Indigenous and non-Indigenous Australians over the coming decades, unless great effort is made by governments to reduce the sources of this inequality now.

My predecessor once observed in the context of standards of Indigenous health that most Australians tend to accept statistics such as these as being almost inevitable - a certain kind of 'industrial deafness' having developed.[134] Justice demands that we do not merely accept these statistics as inevitable. Instead, we should commit to, and be accepting of, measures to raise the position of Indigenous people to 'the level routinely expected by all other members of society.'

In this section, I will consider the human rights justifications for redressing the disadvantage faced by Indigenous youth. The reasons for doing so may be obvious and appear manifest to some. Certainly from a moral perspective I am sure that many people would agree that we should never accept such inequality and injustice being perpetrated against *any* sector of Australian society.

However, we operate in an environment where too often we hear that people should be treated identically. This is borne out in several ways – the main-streaming of service delivery (including towards Indigenous people), resistance to measures that treat Indigenous people collectively, as well as the simplistic assertions that the targeting of Indigenous disadvantage through government programs in some way amounts to discrimination against non-Indigenous people.

The international human rights principles of non-discrimination and equality before the law demonstrate, however, that treating people in an identical manner is not the same as treating people equally. There are two aspects of these principles that demonstrate this difference.

The first, which I will focus on in this section, is the applicability of special measure provisions. These raise the question: have we reached the point at which governments are *required* under international law to make an unqualified effort and commitment to redressing the disadvantage of Indigenous people through the adoption of all appropriate measures?

In the next chapter I will then outline the second aspect of these principles, namely the need to go beyond special measures, by considering the positive obligations on governments to recognise and protect cultural difference.

The principles of non-discrimination and equality before the law

The principles of non-discrimination and equality before the law are central principles of the international human rights system, enshrined in the following treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR), Articles 2, 26;
- International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2; and

<www.atsia.gov.au/budget/budxs/employ_Reithspeech.html>

[134] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, Human Rights and Equal Opportunity Commission, Sydney, 1995, p99.

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Articles 1, 2 and 5.[135]

These principles have attained the status of customary international law. Accordingly, Australia is bound to act in accordance with these principles independently of the operation of these treaties.[136]

The meaning of the principles of equality before the law and non-discrimination is well established at international law. The essential feature of these principles is the understanding that the 'promotion of equality does not necessitate the rejection of difference.'[137] Judge Tanaka of the International Court of Justice explained this concept as follows:

> The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.[138]

Two 'models' of equality are contrasted in this passage – formal and substantive equality. A substantive equality model, as adopted by Judge Tanaka, takes into account 'individual, concrete circumstances.' It acknowledges that racially specific aspects of discrimination such as socio-economic disadvantage, historical subordination and the failure to recognise cultural difference, must be taken into account in order to redress inequality in fact.[139]

Such an approach acknowledges, for example, that Indigenous people are disadvantaged in Australian society, and permits differential treatment of Indigenous people in order to redress this disadvantage.

The alternative approach – formal equality – relies on the notion that all people should be treated identically regardless of their differing circumstances. Such an approach 'promotes the idea that the State is a neutral entity free from systemic discrimination.'[140] As the Minister for Health and Aged Care has stated in relation to the delivery of health services to Indigenous Australians:

> This is, of course, a false view of justice that offers those people who are disadvantaged nothing. Justice does not mean treating everyone the same...
>
> Justice means giving people their due. A fair go means giving people what is their due and Aboriginal people are justly entitled to health care that addresses their needs...

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[135] See also Convention on the Rights of the Child, Article 2. These principles were discussed at length in Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1999, pp30-36. These principles are also recognised in the Universal Declaration of Human Rights, Articles 2 & 7 and the Charter of the United Nations, Articles 1(3), 55(c) – though these instruments do not have the status of treaty law.

[136] The prohibition of systemic racial discrimination has also reached the status of *jus cogens*, i.e. a principle that is so fundamental to the international order that nations cannot derogate from it. See further: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *ibid.*, p30; *Vienna Convention on the law of treaties*, Article 64.

[137] Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *ibid.*, p31.

[138] *South West Africa Case* (Second Phase) (1966) Rep 6, pp303-304, 305.

[139] Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, *op cit*, pp31-32.

[140] Thornton, M., *The liberal promise: Anti-discrimination legislation in Australia*, Oxford University Press, Melbourne, 1990, p16.

> All we are doing is catching up and to characterise Aboriginal people as somehow privileged is false and misleading. To rectify injustice is not to discriminate but is simply to 'set right'.[141]

The United Nations committees that oversee the ICCPR, ICESCR and CERD have explicitly adopted the substantive equality (or equality in fact) approach. The Human Rights Committee,[142] for example, has indicated that equality 'does not mean identical treatment in every instance' and that the Convention is concerned with 'problems of discrimination in fact' not just discrimination in law.[143]

In interpreting this approach, the Human Rights Committee has stated, in relation to the ICCPR, that:

> not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[144]

THE CERD Committee has adopted a General Recommendation in similar terms.[145] Accordingly, differential treatment will not discriminate if the purpose of the differentiation is 'legitimate.'

There are broadly two types of differential treatment that are 'legitimate' within the terms of the ICCPR, ICESCR and CERD. These are actions that constitute 'special measures' and those which recognise and protect the distinct cultural characteristics of minority groups.

Special measures

Special measures are a form of differential treatment that is not discriminatory. They are aimed at achieving substantive equality or equality 'in fact'. The rationale for allowing special measures is that 'historical patterns of racism entrench disadvantage and more than the prohibition of racial discrimination is required to overcome the resulting racial inequality.'[146] Special measures are therefore remedial provisions aimed at raising segments of the community who are not equal to a position of equality within society.

Each of the main human rights treaties contains special measure provisions to promote States to redress inequality in the enjoyment of civil, political, economic, social and cultural rights.

Article 26(1) of the ICCPR guarantees to all persons 'equal and effective protection against discrimination' in the enjoyment of civil and political rights. The Human Rights Committee has interpreted this guarantee as sometimes requiring:

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[141] The Hon. M Wooldridge, Minister for Health and Aged Care, *Aboriginal health: The ethical challenges*, *op.cit.*, pp2-3.

[142] This committee is created under and monitors implementation of the ICCPR.

[143] Human Rights Committee, General comment XVIII, Non-discrimination (1989), paras 8, 9 in United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1, p26. For a discussion of the requirements under CERD see further Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1999, op. cit., Chapter 2.

[144] Human Rights Committee, *General comment 18: Non-discrimination*, 10 November 1989, para 13.

[145] Committee on the Elimination of Racial Discrimination, *General Recommendation XIV on article 1, paragraph 1 of the Convention*, para 2, in Committee on the Elimination of Racial Discrimination, *Compilation of general recommendations*, UN Doc CERD/C/365.

[146] Race Discrimination Commissioner, *The CDEP scheme and racial discrimination*, HREOC, Sydney, 1997, p40, quoted in Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report 1998*, *op.cit.*, p35.

> ...States parties to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions... (A)s long as... action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[147]

Article 1(4) of CERD provides for special measures in similar terms.[148]

Article 2(2) of CERD provides for special measures in relation to economic, social and cultural rights[149]:

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

A former member of the Committee on the Elimination of Racial Discrimination has interpreted Article 2(2) as requiring States parties to pay attention to 'the socio-economic and political situation' of ethnic or minority groups 'in order to ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population.'[150] The test for whether special measures in accordance with Article 2(2) are warranted has been described as:

> Whether the group in question requires the protection and aid of the state to attain a full and equal enjoyment of human rights.[151]

Article 2 of ICESCR also places obligations on States to ensure that economic, social and cultural rights are exercisable in a non-discriminatory manner, as well as 'to take steps' to progressively achieve the full realization of these rights. It states:

> 1. Each State party to the present Covenant undertakes to take steps... especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States Parties to the present Covenant undertake that the rights enunciated... will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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[147] Human Rights Committee, *General comment 18: Non-discrimination*, 10 November 1989, para 10.

[148] Article 1(4) of CERD provides that special measures taken for the sole purpose of securing 'adequate advancement of certain racial or ethnic groups... requiring such protection as may be necessary in order to ensure such groups... equal enjoyment or exercise of human rights and fundamental freedoms' shall not be deemed racial discrimination.

[149] See also Article 4 of the Convention on the Rights of the Child.

[150] Valencia Rodriguez, L., 'The International Convention on the Elimination of All Forms of Racial Discrimination' in United Nations Centre for Human Rights, *Manual on human rights reporting under six major international human rights instruments*, UNCHR, Geneva / New York, 1991, p131, quoted in Pritchard, S., 'Special measures' in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review*, HREOC, Sydney, 1995.

[151] Meron, T., 'The meaning and reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *American Journal of International Law* 283, p308, quoted in Pritchard, S., *op cit*, p192.

The phrase in Article 2(1), 'to take steps', refers to special measures. The Committee on Economic, Social and Cultural Rights has stated that:

> Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[152]

Guaranteeing the equal enjoyment of economic, social and cultural rights is a difficult task that cannot be achieved instantaneously. The Committee on Economic, Social and Cultural Rights has acknowledged that:

> The full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time... Nevertheless, the fact that realization over time... as foreseen under the Convention should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a flexibility device, reflecting the realities of the real world... On the other hand, the phrase must be read in light of the overall objective... of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[153]

In interpreting the scope of the obligation 'to take steps', the Committee has indicated that there is a threshold level of enjoyment of economic, social and cultural rights that States must provide. The Committee has stated that:

> A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Convention.[154]

States parties to ICESCR must be able to demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[155]

Australia's compliance with special measure provisions

The statistical profile of Indigenous youth in Part 1 of this chapter demonstrates the grossly disproportionate rates of disadvantage faced by Indigenous youth[156] in the enjoyment of basic human rights (especially economic, social and cultural rights).[157] It raises several concerns under ICESCR, CERD and the ICCPR.

In particular, the systemic, grossly disproportionate rate of disadvantage faced by Indigenous youth indicates that they do not enjoy the full spectrum of human rights in a non-discriminatory manner. The achievement of the non-discriminatory enjoyment of the full spectrum of human

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[152] Committee on Economic, Social and Cultural Rights, General comment 3: The nature of States parties obligations (Article 2, para 1), 14/12/90, para 2.

[153] *ibid*., para 9.

[154] *ibid*., para 10.

[155] *ibid*.

[156] As this profile also demonstrates, the disparity in enjoyment of economic, social and cultural rights is not reduced for Indigenous people in adult years.

[157] In the remainder of this section I will refer largely to economic, social and cultural rights. There is not, however, a clear demarcation between such rights on the one hand and civil and political rights on the other hand – they are indivisible and inter-related.

rights for all people is the core obligation undertaken by States parties to ICESCR, CERD and the ICCPR.

Under Article 2(2) of CERD, the consequence of this disadvantage and discrimination is that Australia is required to take action 'to ensure the adequate development and protection' of Indigenous people, 'for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.'

Under ICESCR, this discrimination raises concerns that Australian governments may not be meeting their 'core minimum obligations' under the Convention towards Indigenous people across the full range of services that are routinely provided to non-Indigenous Australians. Australian governments[158] must be able to demonstrate that they are providing Indigenous people with 'minimum essential levels of each of the rights' and that they are making every effort to use all resources at their disposition to satisfy, as a matter of priority, those minimum obligations.

The disadvantage of Indigenous youth (and the Indigenous population generally) also raises concerns about whether the governments of Australia are taking sufficient steps, as required under ICESCR, towards the progressive realization of the enjoyment of economic, social and cultural rights by Indigenous people. As noted above, the Committee on Economic, Social and Cultural Rights has interpreted the principle of 'progressive realization over time' in a way that 'should not be misinterpreted as depriving the obligation of all meaningful content.'[159]

One of the main ways that the Committee on Economic, Social and Cultural Rights will consider whether the principle of progressive realization has been 'deprived of meaningful content' in relation to Indigenous Australians will be through examining Australia's periodic reports to the Committee.[160] The Committee has indicated that one of the primary purposes of such reports is to 'demonstrate that the State has developed and is implementing clearly stated and carefully targeted policies, which establish priorities that reflect the provisions of the Covenant.'[161] Redressing the disadvantage of Indigenous Australians clearly must be a priority if Australia is to seek to act in compliance with the terms of the Convention.

Australia's third periodic report contains no discussion of the obligations on Australia 'to take steps' to redress Indigenous disadvantage, nor on the seriousness and priority which they accord to this disadvantage. It also provides no consideration as to whether Australian governments are seeking to redress Indigenous disadvantage in the most efficient and expeditious manner, as required by the Convention.

This is not to say that Australian governments do not acknowledge the disadvantage facing Indigenous Australians, or that they are not taking steps to redress this disadvantage. Clearly, the situation is acknowledged, and there are programs in place that seek to redress this disadvantage.

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[158] While the power to enter into international treaties and conventions on behalf of Australia resides with the federal government, the states and territories of Australia are bound to act in compliance with Australia's international obligations. Article 27 of the Vienna Convention on the Law of Treaties, to which Australia is a party, provides that 'a party may not invoke provisions of its internal law as justification for its failure to perform a treaty.'

[159] Committee on Economic, Social and Cultural Rights, General comment 3: The nature of States parties obligations (Article 2, para 1), op cit, para 9.

[160] Australia's third periodic report was lodged with the Committee on 15 June 1998: Committee on Economic, Social and Cultural Rights, *Periodic Report: Australia*, UN Doc: E/1994/104/Add.22 (State Party Report), 23 July 1998.

[161] Committee on Economic, Social and Cultural Rights, *General comment 1: Reporting by States parties*, 24/02/89, UN Doc E/1989/22, para 4.

A recent example is the Federal Government's Indigenous Employment Program, launched in May 1999. The program has three elements – a wage assistance and cadetship program; an Indigenous Small Business Fund; and Job network.[162]

In formulating this program the Government has acknowledged the clear disadvantage faced by Indigenous Australians in employment status, as well as the difficulties in improving this situation. The government acknowledges, for example, that in order to redress Indigenous unemployment they must consider the following characteristics of the Indigenous population: the unskilled or semi-skilled character of the workforce, the greater proportion of people in rural and remote areas, and the reliance upon publicly funded employment opportunities. The focus of the policy is on improving opportunities in private enterprise.

At this stage the policy is in its formative stages. We will have to wait and see whether it is sufficient to ensure the progressive realization of equality in employment opportunities for Indigenous people. In particular, we will have to wait and see whether it is adequate to address the following concern expressed by the Centre for Aboriginal Economic Policy Research:

> (S)imply to prevent Indigenous labour force status from slipping further behind it will be necessary to maintain a commitment to special employment programs as well as to generate additional outcomes in the mainstream labour market. However, to move beyond this, and attempt to close the gap between Indigenous and other Australians, will require an absolute and relative expansion in Indigenous employment that is without precedent...
>
> Against key indicators of economic status, it is clear that the time available for decisive action is decreasing rapidly. In terms of employment status, for example, the vital issue for Indigenous policy into the new millennium is the distinct prospect that the overall situation will deteriorate. This is primarily because of population growth, but also because of the enormous difficulties of economic catch-up in a rapidly changing and increasingly skills-based labour market.[163]

There are also positive developments where governments are making great effort to further identify how they can best target resources and meet the greatest need. For example, the House of Representatives Standing Committee on Family and Community Affairs is currently conducting a wide-ranging inquiry into Indigenous health. The Committee's inquiry began in September 1997, and is considering issues relating to:

> the coordination of service delivery and planning, barriers to access to services and professional education requirements, as well as consideration of the impact on health of a number of other matters such as location, access to transport, opportunities for employment and education and social and cultural factors.[164]

The Senate Employment, Workplace Relations, Small Business and Education Committee is also conducting an inquiry into Indigenous education, which requires it to:

> review parliamentary, government and commission reports on Indigenous education presented during the past ten years, assess the recommendations made in these reports, investigate the extent to which action has been taken to address them, and to identify any impediments to the implementation of the various recommendations and recommend how these might be removed.[165]

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[162] See Reith, P., *op.cit*, *Indigenous Employment Policy*, Commonwealth of Australia, Canberra, 1999, http://indigenousjobs.dewrsb.gov.au/default.htm

[163] Taylor, J and Hunter, B, *The job still ahead: Economic costs of continuing indigenous employment disparity*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1998, p iv.

[164] House of Representatives Standing Committee on Family and Community Affairs, *Inquiry into Indigenous Health – Discussion Paper*, Parliament of Australia, Canberra, September 1999, p v.

[165] Terms of reference to the Committee.

Similarly, as discussed in the introductory chapter, amendments to the Commonwealth Grants Commission have passed through the House of Representatives. Should they pass through the Senate they will require the Commission to inquire into the needs of Indigenous Australians. The purpose of this inquiry is for the Commission to undertake an independent assessment of the overall need of Indigenous Australians for services and programs, with the ultimate aim of improving the situation of Indigenous people through better allocation of grants.[166]

These initiatives, and others like them, are to be applauded. My concern, however, is that Australian Governments do not explicitly identify the obligation to redress Indigenous disadvantage as a human rights obligation.

I am also concerned that the calls for Indigenous people to move 'beyond welfare dependency' into economic independence, and the frustration expressed at the lack of progress in crucial areas of Indigenous disadvantage often appear to lay blame and place the onus for redressing this disadvantage on Indigenous people themselves. This is not to say that there is not an integral role for Indigenous people in redressing the disadvantage that is faced. Instead, it is to recognise that the obligation to redress disadvantage, and provide equality of opportunity, lies with governments and is a matter of human rights.

As the former Social Justice Commissioner, Dr Mick Dodson, stated in his first report:

> Social justice is not primarily a matter of the relief of suffering. It is a matter of the fulfilment of a responsibility... An understanding of social justice which is explicitly based on rights to equality and rights to fairness, and rights to resources to achieve these objectives, places social justice for Indigenous Australians on its correct foundation.[167]

The policy basis for redressing Indigenous disadvantage should squarely be located within a human rights discourse. There is a distinct role for Indigenous people within such a discourse:

> (This rights based approach) establishes a framework in which Indigenous peoples cannot be regarded as passive recipients of government largess but must be seen as active participants in the formulation of policies and the delivery of programs. The rights of Aboriginal and Torres Strait Islander peoples are at issue. We have a right to determine the manner in which they will be enjoyed.[168]

This chapter has also sought to highlight the international law obligations on governments to respond *adequately* to the situation that Indigenous people face. Indigenous disadvantage is longstanding and long recognised. In twenty years there have been limited gains made. My concern, and my statutory responsibility in producing this report, is to examine the adequacy of the responsiveness of governments.

Determining whether governments are in fact responding adequately is a more difficult task. We know that Indigenous disadvantage is grossly disproportionate and across most indicators has not improved in recent years. We also know that Australia has not engaged in any frank discussion in its most recent report under ICESCR regarding a systematic, national plan for redressing Indigenous disadvantage despite clearly having particular programs and priorities.

A recent study of Commonwealth and State/Territory outlays on education, health, housing and employment programs provides us with some further detail against which to judge the adequacy

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[166] See further: Commonwealth Grants Commission Amendment Bill 1999, Explanatory Memorandum, Parliament of Australia, Canberra, 1999.

[167] Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, AGPS, Canberra, 1993, pp6-7.

[168] *ibid.*

of governmental responses.[169] These four areas are the priority service delivery areas identified by the federal government in budget papers and policy statements. The report seeks to determine whether enough attention is given to Indigenous need in these areas. The concept of need used in the study is 'the additional effort (if any) required to bring outcomes for Indigenous people to comparable overall levels with the Australian population as a whole'[170] or put differently, the effort required to ensure that Indigenous Australians are treated equally.

One of the general conclusions of the study is that Indigenous people are more likely to access specific programs designed to address their needs, rather than general programs that are available, subject to eligibility criteria, to all Australians. This focus on specific programs has developed due to the 'unsuitability, or inaccessibility to Indigenous people, of general programs.'[171] Reasons why general services may be inaccessible or unsuitable include the geographical location of Indigenous people, cultural reasons and a preference for services delivered through organisations under Indigenous control. Accordingly,

> a focus on special programs for Indigenous people alone will provide a misleading picture of the distribution of public expenditure between Indigenous and non-Indigenous people. While Indigenous people benefit substantially more than other Australians from specific programs, they benefit substantially less from many, much bigger, general programs.[172]

The authors concluded the following about expenditure in each of the four areas considered:

- *Education* – Public expenditure on education is 18% higher per capita for Indigenous people than for non-Indigenous in the 3-24 year age group. Equity considerations require that there be additional expenditure on the education of Indigenous Australians, and this difference per head is a 'very modest contribution' to reducing Indigenous disadvantage.[173]

- *Employment* – Public expenditures on programs for the unemployed are 48% higher per unemployed Indigenous person than per non-Indigenous unemployed person. Part of this difference is explained by higher levels of long term unemployment and higher average costs of employment programs for Indigenous people, as well as the reliance upon Community Development Employment Projects (CDEP). The level of disadvantage faced by Indigenous people, the difficulties of maintaining employment levels for the rapidly expanding Indigenous population entering working age and the multiple objectives of the CDEP suggest that the margin 'is not excessive'.[174]

- *Health* – Drawing on analysis in the Deeble report,[175] the authors note that total funding per head, which includes privately and publicly funded health care, is 8% higher for Indigenous people. Given the health status of Indigenous people, 'allocation of public expenditure according to need would almost certainly put more resources into health services for Indigenous people.'[176]

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[169] Neutze, M., Sanders, W., Jones, G., *Public Expenditure on services for Indigenous people – Education, employment, health and housing*, Discussion Paper 24, The Australia Institute, Canberra, 1999.

[170] *ibid*, p1. Note: the authors acknowledge the limitations of this approach, in particular that it does not recognise or take account of the diversity of circumstances and aspirations of Indigenous people.

[171] *ibid*., p3.

[172] *ibid*, p xiii.

[173] *ibid*., pp16-17.

[174] *ibid*., pp28-29. Note the comments quoted earlier by CAEPR that an unprecedented increase in funding is required in order to maintain or improve the employment situation of Indigenous Australians in the coming years.

[175] Deeble, J., Mathers, C., Smith, L., Goss, J., Webb, R. and Smith, V., *Expenditures on health services for Aboriginal and Torres Strait Islander people*, Australian Institute of Health and Welfare, Canberra, 1998.

[176] Neutze, M., Sanders, W., Jones, G, Public Expenditure on services for Indigenous people – Education, employment, health and housing, op.cit, p38.

- *Housing* – Housing benefits expressed on a per capita basis indicate that non-Indigenous people receive between 9 and 21 per cent more benefits than Indigenous people. Given the greater housing needs of Indigenous people, existing policies are 'inequitable and inadequate' and this justifies 'increased resources being put into programs directed specifically towards addressing their housing needs.'[177]

These figures, when compared to the levels of disadvantage highlighted in the first section of this chapter, tend to indicate that while there are government funding and programs aimed at redressing Indigenous disadvantage, they are clearly not sufficient to raise Indigenous people to a position of equality within Australian society. International human rights principles provide justification for giving higher priority to Indigenous disadvantage and for taking steps, or further steps, to redress this disadvantage and achieve equality of outcome.

[177] *ibid*, pp55-56

Chapter 3: Identity

One of the most significant developments in international law in the past twenty five years has been the growing recognition and facilitation of the distinct rights of Indigenous peoples. Central to this movement has been the recognition of the unique status and identity of Indigenous peoples, and the realisation that, on a global basis, Indigenous peoples remain disadvantaged. In this chapter I examine, from the perspective of Australia's young Indigenous people, the importance of Indigenous identity and the ways that it is reflected in the daily lives of Indigenous youth. I then consider the international human rights dimensions of identity. In particular, I highlight the way that international human rights standards have evolved and become more responsive to the circumstances and characteristics of Indigenous peoples. These developments have, in turn, created the imperative for States to move towards a more nuanced, differentiated notion of citizenship and to renegotiate the position of Indigenous people within nations. I conclude the chapter by reflecting on the implications of these evolving standards for Australia, as the nation engages in a process of reconciliation with Indigenous Australians.

Part 1 – Young Indigenous people and identity

We're still here now, and our old people have the accumulation of 40,000 years of knowledge ... we must be valued for [the] contributions we make to this society on our own terms, and on our own points of view because we're not exotic and romantic or remnants of people. We're here and now and we're just human beings with a different culture and history.[178]

In August 1999, the Human Rights and Equal Opportunity Commission hosted an Indigenous Young People's Forum at Tranby College in Sydney. The forum was attended by 60 young Indigenous people from across Australia, aged between 15 and 29 years. Over the two days of the forum the participants shared a number of experiences and opinions on a range of issues. A striking feature of the forum was the realisation that many participants were, in the context of their vastly different lives, dealing with similar issues relating to their identity as young Aboriginal or Torres Strait Islander people.

Indeed, the challenges that the participants faced in coming to terms with their identity was one of the most discussed issues of the forum, and considered by many participants to be the most significant challenge that they faced as young Indigenous people. In this section I will examine the importance of identity to young Indigenous people and the ways that it is reflected in their daily lives.

The challenges that many Indigenous young people face in coming to terms with their identity are extremely difficult and problematic. These challenges range from the overt racism which they experience simply because they are the 'other' to mainstream Australia, the intense public scrutiny to which their lives are subjected, the resentment they receive because they are perceived to belong to a group who are treated 'more favourably' than other Australians,[179] through to the hostility they face because they are not 'full blooded' or 'traditional' or 'dark enough' and therefore not 'real Aborigines' whose motives for identifying as such are frequently considered suspect.

I have confidence, however, in the future of Indigenous peoples in this country by virtue of the fact that young Indigenous people want to identify as Indigenous despite these challenges which they must regularly confront. As the Canadian Royal Commission on Aboriginal Peoples poignantly stated:

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[178] Participant, *Transcript - Indigenous Young Peoples Forum*, Human Rights and Equal Opportunity Commission, Sydney, 5 August 1999, p40.

[179] This myth is discussed further in Chapter 2 of this report.

> Youth want to explore and live their culture ... (T)hey want to learn about the values and beliefs of their people and what it means to be an Aboriginal person in the modern world. They want to learn Aboriginal languages and celebrate their cultures through traditional practices and ceremonies. This need not be done to the exclusion of non-Aboriginal culture. Cultures are not static; they evolve over time. Young people want to learn the values and wisdom that sustained their ancestors long ago – values and wisdom they can use to guide their behaviour in today's world. They want to face the future as Aboriginal people.[180]

In discussing the challenges faced by young Indigenous people in coming to terms with their identity it must be acknowledged that their experiences, lifestyles and circumstances vary greatly. These experiences cannot be reduced to a single viewpoint of universal application. The identities of young Indigenous people are shaped by the different circumstances of their lives. Yet despite this, there are some common features in the lives of many young Indigenous people. It is these common features that I will be focusing on in this section.

Defining Aboriginality[181]

> How do you determine who is an Aboriginal person? Is it a matter of having x% of Aborigine forebears? Is it a matter of hair/skin/eyes? Or is it a matter of being accepted by approved (Aborigine?) judges? Either way it seems to me to be anti-democratic, wide open to fraud, and likely to lead to considerable resentment by those excluded.[182]

An issue that is frequently experienced by many young Indigenous people today in their relationship with the wider society is the questioning of their integrity as an Indigenous person. The above quote is an example of the suspicion and resentment with which some non-Indigenous people regard the assertion by Indigenous people of their status as Indigenous.

The Working Group on Indigenous Populations, established by the United Nations in 1982, has identified a number of features which commonly exist worldwide amongst Indigenous peoples. Indigenous peoples around the world are those peoples, communities and nations who have an historical continuity with societies that existed on their territories prior to invasion or colonisation. Indigenous peoples also have a common experience of subjugation, marginalisation, dispossession, exclusion and discrimination as a consequence of the colonisation of their territories.

Similarly, Indigenous peoples are now a non-dominant sector of modern society who consider themselves to be distinct from other sectors of the society. Put differently, Indigenous peoples have continued to voluntarily perpetuate their cultural distinctiveness. They are also determined to preserve and transmit to future generations their ancestral territories as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. An Indigenous person belongs to Indigenous society through their self-identification as Indigenous, and through being recognised and accepted by the community as one of its members.[183]

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[180] Royal Commission on Aboriginal Peoples, *Volume 4: Perspectives and realities*, Minister of Supply and Services, Ottawa, Canada, 1996, p158. These comments were made in the context of Canada's young Indigenous peoples.

[181] This section relates largely to Aboriginals rather than Torres Strait Islanders.

[182] Letter received by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1999. The author of the letter was protesting at the assertion, made publicly by the Social Justice Commissioner, that there is a distinction between treating people identically regardless of their circumstances and treating them differently in order to provide equality before the law. On this distinction, firmly entrenched in international law, see Chapter 2. The author suggested that treating Indigenous people differently on this basis 'will lead to exacerbation of Aboriginal people's problems' and is 'a sure-fire formula to intensify/foment ongoing social discord.'

[183] United Nations Sub-Commission on prevention of discrimination and protection of minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Volume 5*, UN Doc E/CN.4/Sub.2/1986/7/Add.4,

For the best part of the last two hundred years in Australia, non-Indigenous society has sought to define who is an Indigenous person. Research demonstrates that there have been no less than 67 identifiable classifications, descriptions or definitions of 'Aborigine' in federal, state and territory legislation in Australia.[184] These definitions were 'haphazard, inconsistent, unwieldy and (proceeded in a) far-from-uniform fashion.'[185]

They constituted 'a form of legal apartheid ... (that) preceded South Africa by more than two generations, and continued on a different but parallel course for another three.'[186] Indigenous people were subject to judicial or administrative discretion as to whether they would be considered Indigenous or not, with the effect that 'an artificial legal status could be imposed, withdrawn or re-imposed at the behest of one person in authority.'[187]

The following hypothetical example is drawn from legislative provisions that were in force over the past fifty years, and highlights the impact of this administrative control on the lives of Indigenous Australians:

> In 1935 a fair-skinned Australian of part-Indigenous descent was ejected from a hotel for being Aboriginal. He returned to his home on the mission station to find himself refused entry because he was not Aboriginal. He tried to remove his children but was told that he could not because they were Aboriginal. He walked to the next town where he was arrested for being an Aboriginal vagrant and placed on the local reserve. During World War II he tried to enlist but was told he could not because he was Aboriginal. He went interstate and joined up as a non-Aboriginal person. After the war he could not acquire a passport without permission because he was Aboriginal. He received an exemption from the Aborigines Protection Act – and was told that he could no longer visit his relations on the reserve because he was not an Aboriginal. He was denied permission to enter the Returned Servicemen's Club because he was. In the 1980s his daughter went to University on an Aboriginal study grant. On the first day a fellow student demanded to know, 'What gives you the right to call yourself Aboriginal?'[188]

Attempts in the past to define who is an Aborigine cannot be seen as benign or inconsequential. One participant at the Indigenous Young People's Forum explained a dilemma she faces in coming to terms with her identity as follows:

> I may never know what its like to be black, but I know what its like to be Aboriginal. Even now I struggle with that... even with such a strong background in knowing what my culture is about I still fear that I haven't experienced what a lot of people – say my brother, who's very dark skinned, and my mother – have experienced, and does that take away from my validity to be able to speak as a young Aboriginal woman?
>
> This kind of conditioning, I think, is inherent in a lot of Aboriginal people, and in our forefathers, and has come down through policies that were implemented during the times when our parents and our grandparents were on missions, because they were divided up into half-castes and quarter-castes. That was the way that they separated our communities, and people with lighter skin were treated differently. They were treated as special. They could assimilate into the non-Aboriginal community, and this has caused a lot of

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p29. See also: Chairperson-Rapporteur of the Working Group on Indigenous Populations, *Criteria which might be applied when considering the concept of Indigenous peoples*, UN Doc E/CN.4/Sub.2/AC.4/1995/3, 1995.

[184] McCorquadale, J., 'Aboriginal identity: legislative, judicial and administrative definitions' (1997) 2 *Australian Aboriginal Studies* 24.

[185] *ibid*, p29.

[186] *ibid*.

[187] *ibid*.

[188] Read, P., 'Whose Citizens? Whose Country?' in Peterson, N. & Sanders, W. (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge University Press, Melbourne, 1998, p169.

> resentment within our own communities. This was their way of turning our communities and our families against each other, and regardless of whether this is something that we acknowledge now, its still part of our conditioning, and the way that we think when we look at other people.[189]

Definitions of 'who is an Aborigine' are directly linked to policies of management and control of Indigenous peoples. They form part of the ideology that creates the framework in which the state can act upon and justify its treatment of Indigenous peoples. As Marilyn Wood has noted, the formulation of various definitions of who is Aboriginal had the purpose of being used as 'criteria for inclusion or exclusion in the nation state'.[190] She continues:

> Bureaucratic neglect of a class of people who should logically be included in administrative processes may look like official indifference but the exclusion is neither meaningless nor inconsequential. Instead, such an oversight indicates 'a [passive] rejection of those who are different' providing a 'moral alibi for inaction' which can tacitly sanction repressive actions against the excluded group. These may range from petty discriminations to genocidal killings.[191]

The devastating effect of such definitional control has been demonstrated in the *Bringing them home* report. As stated in the report:

> One principal effect of the forcible removal policies was the destruction of cultural links. This was of course their declared aim. ... Culture, language, land and identity were to be stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance on them.[192]

Policies of removal were premised in denigrating the value of Indigenous cultures and identity:

> Institutionalised Indigenous children faced a hazard over and above that experienced by institutionalised non-Indigenous children. This was the continual denigration of their own Aboriginality and that of their families. ... The assimilation policy seemed to demand that the children reject their families. The tactics used to ensure this ranged from continual denigration of Aboriginal people and values to lies about the attitudes of families to the children themselves. ... The complete separation of the children from any connection, communication or knowledge about their Indigenous heritage has had profound effects on their experience of Aboriginality and their participation in the Aboriginal community as adults.[193]

Many of the Indigenous children who were forcibly removed from their families speak of an alienation from both the Indigenous and non-Indigenous community.[194] As the Acting Social Justice Commissioner noted in her *Social Justice Report 1998*:

> Identity is a fundamental issue and the process of establishing it has not been easy for many. One woman recounted that, after the Inquiry, she had been told to go back to where she came from, even though she does not know where that is. All she is able to connect with as a result of her experience of institutionalisation is a place and a community that

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[189] Participant, *Transcript - Indigenous Young Peoples Forum*, Human Rights and Equal Opportunity Commission, Sydney, 5 August 1999, p35.

[190] Wood, M., 'Nineteenth century bureaucratic constructions of Indigenous identities in New South Wales' in Peterson, N. and Sanders, W. (Editors), *op cit*, p35.

[191] *ibid*, citing Herzfeld, M., *The social product of indifference: Exploring the symbolic roots of Western bureaucracy*, University of Chicago Press, Chicago, 1992, p33.

[192] Human Rights and Equal Opportunity Commission, *Bringing them home*: National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, HREOC, Sydney, 1997, p202.

[193] *ibid*, p200.

[194] *ibid*, p203.

> does not acknowledge her as a member. She now feels she does not belong anywhere. In our meetings, we discovered this experience is not uncommon.[195]

Control of Aboriginal people through definitions of Aboriginality, and through associated policies, historically amounted to a denial of the citizenship or equality rights of Indigenous people in Australia. The denial of basic citizenship rights ranging from the right to vote, to access welfare continued until at least the 1970s. This was a significant restriction on the ability of Indigenous people to live as Indigenous people.[196] As I stated in 1996, 'Historically... attacks on the identity of Aborigines have taken many forms but the ultimate aim has not been the denial of identity *per se* but the denial of other associated rights.'[197]

Perhaps the most lasting result of the definitional control of Indigenous people has been the perpetuation of stereotypes about 'real Aborigines.' As Colin Tatz has stated, in the past thirty years:

> There has been an artificial dichotomy between two 'races' – 'Kakadu Man', tribally rich and tribally pure, and 'Redfern Man', urban, poor and pretending to be what he is not. At various times in the past twenty years, branches of Liberal or National parties have called for a 'tightening' of definitions, mostly centred on 'darkness' of colour or on people 'who dance corroborees' and 'hunt kangaroos'.[198]

Such distinctions, however, do not acknowledge the great diversity of lifestyles and circumstances of Indigenous Australians. As Colin Tatz has stated:

> Very few Aboriginal people live 'non-Aboriginal' lives, divorced from their social and personal histories, origins, geographies, families, lifestyles, cultures and sub-cultural *mores*. This is as true of so-called 'urban part-Aborigines' as it is of tradition-oriented groups in rural and remote Australia. In short, the overall context of Aboriginal life is determined both voluntarily by themselves, and all too often gratuitously imposed by non-Aborigines.[199]

Perceptions of 'real Aborigines' also ignore the fact that cultures evolve and, over time, adapt to new circumstances. As the Royal Commission into Aboriginal Deaths in Custody noted, that Indigenous cultures change is a 'characteristic of nations which think of themselves as having a future as well as a past.'[200] However:

> They have, nevertheless, drawn the reproach of inauthenticity from those who think only of Aboriginal people in terms of the past. Similarly, it is alleged that many of those who claim to be Aboriginal are impostors, usurping the benefits intended for 'real Aborigines'. At the same time, the proliferation of Aboriginalities has created genuine confusion in a public, reared on the image (though rarely the reality) of the 'real Aboriginal.'[201]

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[195] Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1998*, HREOC, Sydney 1999, p39.

[196] For a history of the citizenship status of Indigenous Australians see: Chesterman, J., and Galligan, B., *Citizens without rights. Aborigines and Australian citizenship*, Cambridge University Press, Melbourne, 1997, Chapter 6.

[197] Jonas, W., *Identity rights – Introductory seminar*, Australian Institute of Aboriginal and Torres Strait Islander Studies, unpublished, 1996, p33.

[198] Tatz, C., Aboriginal suicide is different. Aboriginal youth suicide in New South Wales, the Australian Capital Territory and New Zealand: Towards a model of explanation and alleviation, Australian Institute of Criminology, Canberra, 1999, p16.

[199] *Ibid*, p10.

[200] Royal Commission into Aboriginal Deaths in Custody, *National Report, Volume 2*, Australian Government Publishing Service, Canberra, 1991, para 11.12.11, p133.

[201] *Ibid*, pp133-134.

Different lives, different 'worlds'

One of the great challenges that many young Indigenous people face is striking a balance between their place in the Indigenous community of which they are a part and their involvement in the mainstream, wider Australian society.

In discussing this challenge, the Royal Commission on Aboriginal Peoples in Canada stated that Aboriginal youth 'straddle two worlds':

> The non-Aboriginal world has become a fast paced, competitive, changing environment in which even higher levels of education and new skills are required to survive. These are powerful cultural forces that necessitate a secure, solid identity to balance the conflicting messages and demands created where the Aboriginal and non-Aboriginal worlds meet.[202]

Young Indigenous people may live a traditional lifestyle, or alternatively be largely 'assimilated' and live in the mainstream society. Further, they may live somewhere between these 'worlds' and be able to function effectively in either domain (ie, they are 'bi-cultural') or may feel that they do not belong to either.[203] In this instance, they may be 'simply struggling to survive. They are caught between the expectations, values and demands of two worlds, unable to find a point of balance.'[204]

There are numerous indications that many young Indigenous people in Australia find themselves 'between two worlds.' These indicators include statistics on the disproportionate contact of Indigenous youth with criminal justice processes, lower levels of educational attainment, significantly higher Indigenous youth unemployment rates, as well as Indigenous youth suicide rates (which are estimated at 3-5 times higher than non-Indigenous youth suicide rates).[205]

For example, the poor performance of young Indigenous people in the educational system may partly be explained by the lack of acceptance that they feel in that system. As one academic has noted:

> Aboriginal students may come to the point of feeling that to achieve in school terms they have to give up their Indigenous identity and forfeit their acceptance within their Indigenous peer group.[206]

Indigenous youth may thus find themselves unable to find the 'point of balance' in that system. One of the speakers at the Indigenous Young People's Forum stated, on her experiences of the educational system:

> To succeed, we have to be smarter than most white people, because we have to live in two worlds, and be proficient in a second culture, that is, western culture, but we also value and appreciate our own. This means we must work harder to achieve success in a western world, but rarely is this acknowledged. When western culture values the knowledge of our people and starts incorporating into its bastions of knowledge, like universities, books and media, only then will education be truly successful for all of us.
>
> I believe that the failure of the western education system to adequately improve the

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[202] Royal Commission on Aboriginal Peoples, *Volume 3 - Gathering Strength*, Minister of Supply and Services, Ottawa, Canada, 1996, p475.

[203] See further, *ibid*, pp475-6.

[204] *Ibid*, p475.

[205] See further: Tatz, C., *op cit*, Chapter 1.

[206] Groome, H., 'Towards improved understandings of Aboriginal young people', (Summer 1995) *Youth Studies Australia* 17, p20.

> education levels of Indigenous people ... in terms of indicators, is partly due to our rejection of what it teaches us. The systems deny that Aboriginal people have a valuable contribution to make to it now and in the past, so instead of our school books saying that an Aboriginal showed Blaxland, Wentworth and Lawson the way through the Blue Mountains, it says they discovered it. We were here a lot longer, I'm sure we found a way through.[207]

For many others, there may be a sense of confusion in coming to terms with their place in their Indigenous community and the wider society where one of their parents is not Indigenous. As another participant of the Indigenous Young People's Forum stated:

> I'm half-Aboriginal and half-Turkish, and its good to see so many people with two cultures here, because I thought I was pretty unique... I only found out I was Aboriginal when I was sixteen... Sometimes I'm scared to let people know about that... I don't know my background, my identity, my culture and I've got to be able to express that to people from non-Indigenous cultures that know about their cultures. What I need to be able to do is express to them what not having a culture is like, because they don't understand when I tell them that I need to find out who I am, what I need to do...[208]

The challenge of finding a point of balance between these two worlds can be exacerbated by general public attitudes, as discussed above, concerning 'real Aborigines' and the motives for people choosing to identify as such, or by having to face the racism that often manifests in their contact with the wider society.

These factors have been acknowledged within the wider Australian society. For example, a full bench of the Family Court in 1995 hearing a custody dispute between an Aboriginal mother and non-Aboriginal father had to consider whether the trial judge had been correct to reject, on the basis that it was irrelevant, evidence concerning the impact of the Aboriginality of the child.[209] Counsel for the mother had argued that if the child were raised in a non-Indigenous environment it could have a significant effect on the wellbeing of the child, on the basis that 'the lack of reinforcement of their identity (could) contribute... to severe confusions of that identity and profound experiences of alienation.'[210]

The Court found that the trial judge had erred in not considering the evidence, which was highly relevant to determining the best interests of the child. In the course of that finding, Fogarty, Kay and O'Ryan JJ stated:

> (A) In Australia a child whose ancestry is wholly or partly Indigenous is treated by the dominant white society as "black", a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships, and seeking employment and housing.
>
> (B) The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.

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[207] Speaker, *Transcript - Indigenous Young Peoples Forum*, Human Rights and Equal Opportunity Commission, Sydney, 5 August 1999, p30.

[208] *Ibid*, 6 August 1999, p38.

[209] *B v R* (1995) 127 FLR 438.

[210] *Ibid*, per Fogarty, Kay and O'Ryan JJ, p446.

> (C) Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious of that, they are less able to deal with it or prepare Aboriginal children for it.
>
> (D) Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life.[211]

The past in the present

A further factor that poses a significant challenge for young Indigenous people in coming to terms with their identity is the continuing impact of the historical treatment of Indigenous peoples in Australia. Young Indigenous people continue to pay the price of systemic racism and poverty, and to suffer the effects of hundreds of years of colonialism.

In his study of Aboriginal youth suicide in New South Wales, the Australian Capital Territory and New Zealand, Colin Tatz states that Aboriginal youth suicide 'has different wellsprings, histories, sociologies, patterns and even rituals. It is qualitatively different, and needs to be viewed and responded to differently.'[212] A significant difference, and factor which partially explains current rates of Indigenous youth suicide, is the legacy of history:

> The collective and individual experience of contemporary Aboriginal lives is unique. No other group has endured the panoply of laws, edicts and administrative arrangements established to target an entire people regarded as being in need of care and protection. That the protection was in their 'best interests' does not alter the reality that they were designated as a separate legal class of persons – minors in law – with all the attendant disabilities of that status. Accordingly, they were physically isolated, segregated, relocated and institutionalised. Their biological, cultural, political, economic and social lives were regulated by state and church 'gatekeepers', mostly in secret, with permit systems to keep Aborigines in and outsiders out of the areas known as reserves or missions.
>
> Regardless of regional, linguistic, tribal, clan and 'degrees-of-blood' differences, Aborigines were, and are, perceived as *one people*. If there is indeed a one-ness, it lies in the *commonality of history* – victims of physical killing, settler animus, missionary contempt, decimation by disease, legal wardship, and destruction of their social institutions. History, rather than race, colour or culture, has been their unifying and sustaining separateness.[213]

Similarly, the Royal Commission into Aboriginal Deaths in Custody stated that:

> One of the central findings of the Commission is that a multitude of factors, both historical and contemporary, interact to cause Aboriginal people to be seriously over-represented in custody and tragically to die there. So much of the Aboriginal people's current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past.[214]

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[211] *ibid*, pp449-450.

[212] Tatz, C., Aboriginal suicide is different. Aboriginal youth suicide in New South Wales, the Australian Capital Territory and New Zealand. Towards a model of explanation and alleviation, Executive Summary, Australian Institute of Criminology, Canberra, 1999, p2.

[213] *ibid*.

[214] Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, p1. See also paras 10.1.1-8, pp 3-8.

As Augie Fleras notes, one of the consequences of the historical treatment of Indigenous peoples in Australia is that they now occupy an 'entrapped status' as dispossessed subjects. Their disempowerment can be attributed to a variety of colonising processes and policies, which have variously had the intention or effect of the:

> destruction of Indigenous culture or society; colonisation of its inhabitants; forced compliance with dominant values; inferiorisation as the 'other'; absorption into the mainstream; forcible incorporation into the prevailing political framework; and deference to the State as sovereign source of authority or entitlement.[215]

Indigenous people today often have to come to terms with the legacy of this past. There are three aspects to this legacy that I will mention here. First, are the consequences of the almost total control exercised by the State over the lives of many Indigenous people. As the Royal Commission into Aboriginal Deaths in Custody stated:

> Aboriginal people, quite apart from being the most controlled group within the Australian community, must also have been the group most studied by non-Aboriginal people.[216]

Recent criminological discussion has begun to re-contextualise the relationship between Indigenous people and the criminal justice system within this framework of colonialism and the control exercised over Indigenous people. As Roderic Broadhurst commented in a recent issue of the *Australian and New Zealand Journal of Criminology*, imprisonment has traditionally been seen as an 'efficient' mechanism for the State to manage race conflicts and cross-cultural inequalities within society.[217] In accordance with this, there has been a recent shift in criminological research from focusing on Indigenous peoples as 'problems' to be managed, to a focus on:

> the settler state and the legacies of (post) colonialism. The subject of interest is the settlers and how they have conceptualised the Indigenous and mobilised the law to legitimate land theft and manage 'race' conflicts.[218]

The second impact of this control relates to the economic dimensions of the disempowerment of Indigenous peoples. As Augie Fleras notes, 'colonialism continues to survive (within Australia) by virtue of the structural inequalities between First Nations and the Crown.'[219] Captain Cook, upon first arriving in Australia, is said to have commented about the Indigenous inhabitants that 'they live in a tranquility which is not disturbed by inequality of condition.'[220]

As the youth profile in Chapter 2 demonstrates, the situation today is one of grossly disproportionate disadvantage when compared to the rest of Australian society. As noted in the introductory chapter and chapter 2, there are linkages between economic disadvantage, poor educational outcomes, unemployment, contact with criminal justice processes and health status. These factors are the clearest indication of the ongoing dimensions of the historical treatment of Indigenous Australians.

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[215] Fleras, A., 'Politicising indigeneity' in Havemann, P. (Ed.), *Indigenous people's rights in Australia, Canada and New Zealand*, Oxford University Press, Auckland, 1999, p191.

[216] Royal Commission into Aboriginal Deaths in Custody, *National Report - Volume 2*, para 11.12.1, p130.

[217] Broadhurst, R., 'Crime, justice and Indigenous peoples: the "new justice" and settler States' (1999) 32(2) *Australian and New Zealand Journal of Criminology* 105, p105.

[218] *ibid*, p107. This issue is taken up further in chapter 5 on mandatory detention provisions in the Northern Territory and Western Australia.

[219] Fleras, A., 'Politicising indigeneity' in Havemann, P. (Ed.), *Indigenous people's rights in Australia, Canada and New Zealand*, *op cit*, p187.

[220] Quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, *First report 1993*, AGPS, Canberra, 1993.

The third way that the historical treatment of Indigenous people manifests in the lives of young Indigenous peoples is quite simple: because Indigenous people survived. We are still here.

Relations between Indigenous and non-Indigenous people today are infused with historical overtones because of the failure of the wider society to acknowledge and come to terms with this history. As Sanders and Peterson argue, Australian history is distinguished by:

> an attitude of ambivalence and inconsistency towards formally incorporating Aboriginal people into a common Australian society and a failure by the settler state to come to grips with the persistence of Indigenous identities and social orders.[221]

The situation that Australia finds itself in now is the legacy of not recognising the validity of Indigenous social structures and the failure to give appropriate weight to them within the Australian nation. In the next section of this chapter I explain how developments in the international human rights system form the basis of Indigenous Australians' call for the wider society to come to terms with this history. Australia's international obligations provide an imperative for Australia to recognise the legacy of the past and provide appropriate recognition of and a place for Indigenous Australians within our nation.

Part 2 – Identity rights

> There have been two great themes to our struggle: citizenship rights, the right to be treated the same as other Australians, to receive the same benefits, to be provided with the same level of services, and Indigenous rights, the collective rights that are owed to us as distinct peoples and as the original occupiers of this land.[222]

The protection afforded to Indigenous peoples by the international law system has changed dramatically over the past century. At the beginning of the twentieth century, Indigenous peoples were excluded from the process and protection of international law, which was formulated by and upheld the claims of colonial states.

International law, at that time, was based on theories that 'ensured that the law of nations, or international law, would become a legitimizing force for colonization and empire rather than a liberating one for Indigenous peoples.'[223] The theoretical underpinnings of this system, based on a positivist framework, placed sole emphasis on the rights and duties of states, and upheld their exclusive sovereignty over territories in which they had gained control. International law shielded states from scrutiny by applying *between* states rather than imposing obligations upon states in their domestic conduct.

Consequently, Indigenous peoples 'were denied statehood and the rights to make international law or benefit from its protection, either as groups or individuals ... and the treatment of Indigenous peoples became a private domestic affair for the state in which they lived, immune from external scrutiny and comment.'[224]

However, at the end of the twentieth century the international human rights system has evolved

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[221] Peterson, N. and Sanders, W., 'Introduction' in Peterson, N. and Sanders, W. (Editors), *Citizenship and Indigenous Australians – Changing conceptions and possibilities*, *op cit*, p3.

[222] O'Donoghue, L., Address to Constitutional Reform Conference, Adelaide, 11-13 February 1996, cited in Chesterman, J. and Galligan, B., *Citizens without rights – Aborigines and Australian citizenship*, Cambridge University Press, Cambridge, United Kingdom, 1997, p193.

[223] Anaya, S.J., *Indigenous peoples in international law*, Oxford University Press, New York, 1996, p19.

[224] Iorns Magallanes, C., 'International human rights and their impact on domestic law on Indigenous People's rights in Australia, Canada and New Zealand' in Havemann, P., *op cit*, p236.

to the point where it increasingly recognises and protects the distinct rights of Indigenous peoples.

Central to this movement has been the recognition of the identity and cultures of Indigenous peoples, and the unique position within society that they occupy. The protection and preservation of Indigenous cultures and identity has begun to be acknowledged as an enrichment of the fabric of the wider society.

This growing recognition of the distinct rights, or identity rights, of Indigenous peoples has been swift, only occurring over the past twenty five years. As one commentator has noted, international law has developed and continues to develop, 'however grudgingly or imperfectly' to support Indigenous people's claims.[225]

A development that has run parallel to the recognition of the identity rights of Indigenous peoples has been the realisation that, on a global basis, Indigenous peoples remain disadvantaged. It has been acknowledged that their situation has generally not improved despite the intended universality of the values and principles of the modern human rights system. The United Nations system has generally responded in two ways to this realisation.

First, recent years have seen developments in the core principles of the international law system, such as the principles of non-discrimination and equality before the law, in order that they may more appropriately respond to the circumstances of Indigenous peoples. The recent consideration of Australia by the Committee on the Elimination of Racial Discrimination, in relation to the native title amendments, reflects this shift in international thought.[226]

Second, the United Nations has begun to respond to the continued inequality faced by Indigenous peoples, as well as to recognise their unique status within states, through providing a forum – the Working Group on Indigenous Populations - for Indigenous peoples to elaborate upon and develop further the application of existing human rights standards. The Draft Declaration on the Rights of Indigenous Peoples is one of the major products of this engagement.[227] Rather than creating new principles of human rights, it contains more specific and targeted provisions that elaborate upon the applicability of existing standards to Indigenous peoples. The International Labour Organisation's *Convention 169 concerning Indigenous and tribal peoples in independent countries* (herein ILO Convention 169), adopted by the ILO in 1989, also seeks to respond to the continued inequality and unique status of Indigenous peoples.[228]

These developments pose a significant challenge to traditional notions of state sovereignty. They confirm that states do not have unfettered ability to treat segments of society in whatever manner they choose, free from external scrutiny, obligations and expectations. Ultimately, these developments have created an imperative for states to develop more nuanced, differentiated notions of citizenship, where sovereignty is no longer exclusive but shared with multiple actors, including Indigenous peoples.

Yet many, if not most, nations around the world - including Australia – have yet to fully comprehend and accept the ramifications of this changing international legal order.

In this section I do not intend to provide a history of Indigenous peoples' engagement with the

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[225] Anaya, S.J, *op cit*, p4.

[226] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Chapter 2.

[227] Un Doc. E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994. The Draft Declaration is extracted at (1996) 1 *Australian Indigenous Law Reporter* 145.

[228] Australia is not a signatory to the Convention, which entered into force on 5 September 1991. The Convention is reproduced at (1996) 1 *Australian Indigenous Law Reporter* 472.

international human rights system or to provide a chronology of developments in international human rights principles.[229] Instead, I am going to focus on the following two issues that have permeated recent developments in international human rights standards:

- The legitimacy of recognising difference, and
- Self-determination and requirements of 'effective participation'

The discussion of these themes and principles provides signposts and some guidance on ways that Australia might appropriately respond to this changing legal order. I conclude this section by considering these options in the context of the current process of reconciliation.

The legitimacy of recognising difference

In chapter 2 of this report I examined the meaning of the principles of non-discrimination and equality before the law.[230] As I noted in that chapter, an essential feature of these principles is the understanding that providing equality does not necessitate the rejection of difference. Indeed, the failure to recognise difference may in certain circumstances amount to discrimination and perpetuate existing inequality.

There are two forms of differential treatment that are accepted as legitimate, and hence non-discriminatory, within the framework of equality and non-discrimination. The first, which I discussed in chapter 2, is actions that can be classified as special measures.

A focus solely on special measure provisions, however, obscures a significant aspect of the international human rights system. Special measures can appear to limit the recognition of Indigenous rights to actions that bring Indigenous Australians to the same level as non-Indigenous people. As one Indigenous activist has noted:

> If equality is about making me have the same values and the same priorities then I do not want it. I want access and equity. If the end result of equality is being like you white fellas, then I do not want it. I do not believe that is what our people want. We have a separate identity.[231]

Accordingly, the international human rights system provides that in certain circumstances it is appropriate to recognise the distinct cultural characteristics of particular groups, especially minorities. This forms the second type of differential treatment that is 'legitimate' and non-discriminatory at international law. These circumstances are where there is a reasonable, objective and proportionate nexus between the relevant difference and its legal recognition in order to achieve equality of treatment.[232]

The United Nations High Commissioner for Human Rights, Mary Robinson, recently re-affirmed that the protection of cultural difference is integral to the international human rights system and inter-woven with one of the fundamental propositions of this system, namely the universality of human rights:

> In championing the cause of universality I should emphasise that universality does not

[229] For an analysis of developments in the application of international law to the situations of Indigenous peoples see: Anaya, S.J., *op.cit*, Chapters 1, 2; Havemann, P, 'Chronology 2: Twentieth century public international law and Indigenous peoples' in Havemann, P., *op.cit*.

[230] See in particular pp 50-52.

[231] Fewquandie, B., quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, January-June 1994*, AGPS, Canberra, 1995, p40.

[232] See further: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, *op.cit*, pp32-34.

> negate cultural diversity; on the contrary, I believe that it reinforces and protects cultural diversity.[233]

The Committee on the Elimination of Racial Discrimination has recognised that measures that seek to protect the culture and identity of Indigenous peoples may constitute a legitimate, non-discriminatory, differentiation of treatment. The Committee has recognised that Indigenous peoples worldwide:

> have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources... Consequently the preservation of their culture and their historical identity has been and still is jeopardized.[234]

Due to this continued inequality the Committee has felt it necessary to emphasise that the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) places obligations on States to take all appropriate means to combat and eliminate discrimination against Indigenous peoples. The Committee has called on States to:

> a) recognize and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
>
> b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;
>
> c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
>
> d) ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> e) ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages.[235]

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) also protects the cultural rights of Indigenous peoples.[236] It provides that:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Human Rights Committee has stated that this Article 'establishes and recognizes a right which is conferred on individuals belonging to minority groups.'[237] The persons who are designed to be protected by this provision are those who belong to a group and who share in common a culture, religion, and/or a language. It is 'distinct from, and additional to, all the

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[233] Robinson, M., United Nations High Commissioner for Human Rights, *The Universality of human rights*, Statement, Bonn, 11 November 1999.

[234] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, UN Doc CERD/C/51/Misc.13/Rev.4, 18 August 1997, para 3.

[235] *ibid*, para 4.

[236] See further the discussion on Article 27 in Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, *op.cit*, pp51-55. The minority group rights protected by Article 27 include Indigenous minority rights, but do not exhaust the rights of Indigenous peoples.

[237] Human Rights Committee, General comment 23, Article 27 (1994), para 1 *in Compilation of General Comments and general Recommendations adopted by the Human Rights Treaty Bodies*, op.cit.

other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant."[238]

The obligation that is imposed on states by Article 27 is expansive. As the Human Rights Committee has explained:

> A State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself... but also against the acts of other persons within the State party... (P)ositive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and to practise their religion, in community with the other members of the group.[239]

These standards are further elaborated upon in the Draft Declaration on the Rights of Indigenous Peoples and ILO Convention 169. In addition to the detailed elaboration of the application of the right to self-determination to Indigenous peoples, which is discussed further below, both documents reiterate the importance of recognising and protecting the distinct identity and cultures of Indigenous peoples.

ILO Convention 169 provides that in applying the provisions of the Convention "the social, cultural, religious and spiritual values and practices of (Indigenous) peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals. The integrity of the values, practices and institutions of Indigenous peoples shall be respected."[240]

The Draft Declaration promotes similar respect for the cultures of Indigenous peoples. It provides rights "to practise and revitalise their cultural traditions and customs" and to "manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies."[241]

It is crucial that governments accept the need to recognise cultural difference if they are to adequately respond to Indigenous disadvantage and comply with the principles of non-discrimination and equality before the law. If we have learned anything from the past it is that mainstream services that do not take into account the distinct cultural characteristics of Indigenous peoples will not be effective in improving the situation of Indigenous peoples.

Until the rights that are associated with the identity of Indigenous peoples are recognised, Indigenous Australians will not be in a position to enter into an equal relationship with the rest of Australian society. As my predecessor once noted:

> Maintaining Indigenous identity and culture... is not simply an end in itself. Unless and until our identity is recognised we cannot and will not participate as full Australian citizens. It is one of the paradoxes of Indigenous policy in nation-states that only through recognition of distinct communities and rights pertaining to such communities are Indigenous people willing – and for the most part able – to accept the majority society as other than a threat and an alien world.[242]

For the reasons put forward in relation to special measure provisions in the previous chapter,

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[238] *ibid*, para 1.

[239] *ibid*, paras 6.1, 6.2.

[240] ILO Convention 169, Article 5.

[241] *Draft Declaration on the Rights of Indigenous Peoples*, Articles 12, 13.

[242] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous social justice – Strategies and recommendations*. Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package, HREOC, Sydney, 1995, p7.

achieving mainstream political acceptance of the legitimacy of recognising cultural difference is a necessary but difficult task.

The controversy and division surrounding the recognition of native title in the High Court's *Mabo* decision demonstrates the difficulty of this task. Fundamentally, the challenge that this decision posed for Australian society was the recognition of the legitimacy of the distinct identity of Indigenous peoples:

> The decision dealt with what can be labelled the 'distinct rights' of Aboriginal and Torres Strait Islander peoples. While the High Court decision was specifically concerned with Indigenous land title and rights, its acknowledgment of the ongoing legal validity of Indigenous law and custom pointed to the need for a broader recognition of the fact that as distinct peoples, Aboriginal and Torres Strait Islander peoples are entitled to enjoy distinct and unique rights. Such rights arise from our status as the First Peoples of this country, peoples whose rights predated its colonisation and the imposition of non-Indigenous law and social structures. Such distinct rights include, but are not limited to, the right to practice and enjoy our distinct cultures, the right to control over natural resources and the environment and the right to self-determination.[243]

Tim Rowse has commented on the difficulties of achieving political acceptance of the legitimacy of recognising difference, in relation to the movement in Australia over the past twenty years away from policies of assimilation:

> There was an heroic (and mistaken) simplicity in the normative pretensions of 'assimilation'. 'They' would eventually be like 'us', and little more needed to be said, because this conviction manifested an egalitarianism which no reasonable Australian could question. Intended as a magnificent departure from certain kinds of colonial racism, this emphasis on 'equality' proved to be racist in a different way – its failure to acknowledge the right to be different. Once the legitimacy of Indigenous difference began to be acknowledged, the notion of equality had to become more complex. The problem (for those who like simplicity) is that there is no end to the process of arbitrating the rival claims of 'equality' and 'difference'...[244]

The challenge that this raises for setting government policies and programs relating to Indigenous Australians is 'the unavoidable necessity to reflect on and to argue about the values implicit in social policy. A settler democracy which is waking up to its colonial formation has no reason to expect anything more or less than that.'[245]

The consequences of not giving credence to these principles are the continued inequality of Indigenous Australians in our society. The profile of Indigenous youth in the previous chapter highlights how unacceptable a continuation of this situation would be.

Self-determination and requirements of 'effective participation'

Central to debates in international arenas concerning the appropriate recognition of Indigenous peoples and cultures within states is the concept of self-determination. As I discussed in chapter 1, Australia is among those states that seek to limit the applicability of the principle of self-determination to Indigenous peoples.

Yet self-determination is the central, most fundamental principle of the international human rights system. It epitomises the interdependence and indivisibility of all human rights. This is

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[243] *ibid*, p2.

[244] Rowse, T., *White flour, white power. From rations to citizenship in central Australia*, Cambridge University Press, Cambridge, United Kingdom, 1998, pp221-222.

[245] *ibid*, p222.

demonstrated by the fact that the right to self-determination is Article 1 of both the ICCPR and the International Convention on Economic, Social and Cultural Rights (ICESCR). As Dr Ted Moses, Ambassador of the Grand Council of the Crees, has described it:

> Self-determination as a right, pertains not only to political status, but equally to economic, social and cultural development. As such, self-determination is a concept of sweeping scope that encompasses all aspects of human development and interaction, cultural, social, political and economic. It is not simply a political right as it is most often characterized. And it is not exclusively an economic right. It is a complex of closely woven and inextricably related rights which are interdependent, where no one aspect is paramount over any other.[246]

The right to self-determination is set down in Article 1 of the ICCPR and ICESCR, as follows:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 3 of the Draft Declaration on the Rights of Indigenous Peoples is identical to Article 1(1).

There are a number of features of the right of self-determination that emerge from this provision. The first is that the right of self-determination is not created by Article 1 of the ICCPR and ICESCR. Instead, Article 1 confirms the existence of the right:

> 'By virtue of that right', to use the words of the Covenants, certain freedoms flow. It is these freedoms which make up the content of the right of self-determination. We might think of these freedoms as derivative rights which flow from the right of self-determination, and as such are part of the right of self-determination and may not be separated from it.[247]

Secondly, the right of self-determination applies to peoples (or 'a people' as referred to in Article 1(2)). Many States have been resistant to the notion that Indigenous peoples are capable of enjoying the right of self-determination, on the basis that they are not a 'peoples' within the meaning of Article 1.

Recent comments by the Human Rights Committee, however, negate the claim that the right of self-determination does not apply to Indigenous peoples. The Committee's concluding observations on Canada's fourth periodic report under the ICCPR included the following paragraphs:

> 7. The Committee, while taking note of the concept of self-determination as applied by Canada to the Aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State

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[246] Moses, T., 'Self-determination and the survival of Indigenous peoples – the crucial significance of this international human right' (July/September 1999) 31 *doCip Update* 7, p7.

[247] *Ibid*, p8.

> party to report adequately on implementation of article 1 of the Covenant in its next periodic report.
>
> 8. The Committee notes that, as the State party acknowledged, the situation of the Aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of Aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent Aboriginal rights be abandoned as incompatible with article 1 of the Covenant.[248]

These passages clearly conceive of self-determination as a right that is of application to Indigenous peoples. As Dr Ted Moses has stated: 'All objections to the inclusion of Article 3 in the United Nations Declaration on the Rights of Indigenous Peoples are now moot.'[249]

Much of the resistance by States to the application of the principle of self-determination to Indigenous peoples also appears to stem from concerns that self-determination in its fullest sense equates with a right to create an independent state.

This concern is reinforced by the fact that the main application of the principle of self-determination in the past fifty years has been in the context of decolonisation (which has largely led to the creation of independent states).[250] As James Anaya notes, this concern is misconceived and mixes up the substantive and remedial aspects of the right of self-determination:

> The *substance* of the norm – the precepts that define the standard – must be distinguished from the *remedial* prescriptions that may follow a violation of the norm, such as those developed to undo colonization. In the decolonization context, procedures that resulted in independent statehood were means of discarding alien rules that had been contrary to the enjoyment of self-determination. Remedial prescriptions in other contexts will vary according to the relevant circumstances and need not inevitably result in the formation of new states.[251]

Accordingly, the substantive elements of self-determination apply broadly, whereas 'remedial prescriptions and mechanisms developed by the international community necessarily only benefit groups who have suffered violations of substantive self-determination.'[252]

The fourth feature of the principle of self-determination is contained in Article 1(2) of the ICCPR and ICESCR. This Article elaborates upon the practical application of the principle to Indigenous peoples:

> It concerns the right to use and benefit from natural wealth and resources. And because this concept is so important and so elemental to the basic meaning of everything else contained in the Covenants, the principle is stated twice – one in the positive and then again in the

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[248] Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, 7/4/99, UN Doc CCPR/C/79/Add.105.

[249] Moses, T., *op.cit*, p11.

[250] See further: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, *op.cit*, pp 58-60.

[251] Anaya, S.J, *op cit*, p80.

[252] *Ibid*.

negative...

> For Indigenous peoples it is the essential content of self-determination: we may not be denied our *own* means of subsistence. The words 'in no case' imply that the prohibition is absolute. We may not be denied the wherewithal for life itself – food, shelter, clothing, land, water, and the freedom to pursue a way of life. There are no exceptions to this rule.[253]

Accordingly, 'the right of self-determination contains the essentials for life – the resources of the earth and the freedoms to interact as societies and peoples.'[254]

A final feature of the right of self-determination as expressed in Article 1 of the ICCPR and ICESCR is that Article 1(3) requires states to do more than simply respect the right of self-determination. States must also 'promote the realization of the right of self-determination.'

The conceptual underpinnings of the principle of self-determination, as set down in Article 1 of the ICCPR and ICESCR, pervade the Draft Declaration on the Rights of Indigenous Peoples and ILO Convention 169. These documents elaborate ways in which the principle of self-determination applies to Indigenous peoples.

For example, ILO Convention 169 requires that:

- governments develop, 'with the participation of the peoples concerned, coordinated and systematic action to protect the rights of Indigenous peoples and to guarantee respect for their integrity. Such action shall include measures for... promoting the full realisation of the social, economic and cultural rights of (Indigenous) peoples with respect for their social and cultural identity, their customs and traditions and their institutions';[255]
- in applying the provisions of the Convention, 'Governments shall consult the peoples concerned,... whenever consideration is being given to legislative or administrative measures which affect them directly';[256] and
- 'the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use; and to exercise control, to the extent possible, over their own economic, social and cultural development.'[257]

The Draft Declaration sets out the right of self-determination in the following terms:

- the right of self-determination, in terms identical to Article 1 of the ICCPR and the ICESCR;[258]
- the right 'to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, social and cultural life of the State';[259]
- the 'collective and individual right to maintain and develop their distinct identities and

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[253] Moses, T., *op.cit*, p8

[254] *Ibid*

[255] ILO Convention 169, Article 2

[256] *ibid*, Article 6

[257] *ibid*, Article 7

[258] Draft Declaration on the Rights of Indigenous People, Article 3

[259] *ibid*, Article 4

characteristics.[260]

- the 'right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions';[261]
- the right 'to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures;'[262]
- the right 'to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities';[263] and
- the right to 'determine and develop priorities and strategies for exercising their right to development... and, as far as possible, to administer such programmes through their own institutions.'[264]

The Draft Declaration also includes more extensive provisions on self-determination that specifically guarantee Indigenous rights to participate in decisions about land management and resource use,[265] and economic and social development.[266]

The standards in these documents cannot be dismissed on the basis that Australia is not a signatory to ILO Convention 169 and that the draft Declaration remains merely a draft. These documents do not *create* new rights for Indigenous peoples. Instead they elaborate upon the content of existing standards, such as Article 1 of the ICCPR and ICESCR. They apply because 'the collective and inherent rights to self-determination of jurisdictions pertaining to land, identity and political voice have never been extinguished but prevail in international law as a basis for entitlement and engagement.'[267] They form the basis of Indigenous peoples' attempts to renegotiate their position within states by requiring that states ensure the 'effective participation' of Indigenous peoples.

The requirement of effective participation has also been reiterated by the Human Rights Committee in relation to cultural and minority group rights under Article 27 of the ICCPR,[268] and by the Committee on the Elimination of Racial Discrimination in relation to the principle of equality before the law under Article 5 of CERD.

In its decision on Australia of 18 March 1999, concerning the native title amendments, the Committee on the Elimination of Racial Discrimination expressed its concern that Australia had not complied with Article 5(c) of the Convention and General Recommendation XXIII concerning Indigenous Peoples in relation to this requirement.

> The lack of effective participation by Indigenous communities in the formulation of the

[260] *ibid*, Article 8.

[261] *ibid*, Article 19.

[262] *ibid*, Article 20.

[263] *ibid*, Article 21.

[264] *ibid*, Article 23.

[265] *ibid*, Articles 15, 30, 31.

[266] *ibid*, Articles 23, 24.

[267] Fleras, A., 'Politicising indigeneity' in Havemann, P. (Ed.), *Indigenous people's rights in Australia, Canada and New Zealand*, *op.cit*, p187.

[268] Human Rights Committee, *General comment 23, Article 27* (1994), *op.cit*, para 7.

> amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of Indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."[269]

The government representatives before the Committee had presented a very different view of what was required of State Parties under the Convention in ensuring that Indigenous representatives participated in the formulation of legislation and policies which directly affect them.

> I note also that the CERD's general recommendation in Paragraph 4d goes on to say that no decisions directly relating to the rights of Indigenous People are to be taken without their informed consent. This is a higher level of responsibility, a higher level of obligation than simply providing equal rights. This is a requirement to provide for the informed consent of Native Title holders. Australia admits that the informed consent of Native Title holders and Indigenous Peoples was not obtained in the Native Title Amendment Act. Australia regrets this. As I said at the beginning on Friday, the government attempted to obtain a consensus with regard to the Act but despite a lengthy process, that consensus was not possible and in the end the parliament had to make the laws which it judged were appropriate... Australia regards this requirement essentially as aspirational and it tried to meet and aspire to this requirement but it admits honestly before this Committee that the requirement was not met.[270]

The Committee disagreed with this interpretation of the Convention:

> (I)n our general recommendation 23, we referred to the informed consent... it was said that this requirement of informed consent is only aspirational. Now it is not understood by this committee in that sense. I think there we tend to disagree.[271]

The requirement of effective participation and informed consent applies in relation to the standard of equality before the law because:

> The justification for making this additional commitment towards a negotiated outcome with Indigenous people is the recognition that the relationship between Indigenous and non-Indigenous people should be an equal one... (A) relationship of equality is not one in which Indigenous people take their place, as just another interest group, among the vast range of non-Indigenous interest groups which might be affected by native title. Rather it is one where Indigenous interests are equal to the combined force of non-Indigenous interests, in all their forms and manifestations. A legislative regime which is imposed rather than negotiated with the Indigenous people it directly affects is not based on a relationship of equality.
>
> Implicit in a relationship of equality is the recognition that the dispossession and marginalisation of Indigenous people has been as a result of their subjugation by **all** non-Indigenous interests. For Indigenous people there is little difference whether, at any particular time in the history of white settlement, mining interests or farming interests or the State itself are the proponents of their dispossession. These are all aspects of the same colonial structure which, since sovereignty, has failed to recognise the rights and interests

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[269] Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2., para 9.

[270] Australian Representative in: Foundation for Aboriginal and Islander Research Action, *Minutes of the 1523rd meeting of the Committee on the Elimination of Racial Discrimination*, <www.faira.org.au/cerd/index.html> (Herein FAIRA, CERD Transcript), p38.

[271] Mr Von Boven, *ibid*, p43.

of Indigenous people.[272]

Conclusion - Identity rights and reconciliation

Over the past twenty years, the inter-relationship between domestic and international arenas has increased, largely due to processes of globalisation. Developments in international arenas have consequently become of increasing significance in domestic ones. The increasing recognition of the rights of Indigenous peoples, and the voicing of Indigenous concerns in international forums, such as the Working Group on Indigenous Populations, is a clear example of this inter-relationship.

The international recognition of identity rights forms the basis for the re-empowerment within Australia of Aborigines and Torres Strait Islanders. They form the basis for attempts by Indigenous peoples 'to rewrite a social contract, the benefits of which they have never fully enjoyed.'[273]

This is not an easy task. It involves balancing requirements of providing equality and appropriately recognising difference. As Paul Havemann notes, it involves 'the politicising of difference in nation-states built around universalising discourses and foundational myths. Consequently, it is a slow, uncomfortable and haphazard process of advance and retreat.'[274] It involves challenging myths upon which the Australian nation was built. And it requires that Australia come to terms with the historic denial of the rights of Indigenous Australians.

As the belated recognition of native title demonstrates, however, the task will grow increasingly more difficult until it is faced. There is no possibility that it will simply go away. States cannot continue to simply ignore Indigenous claims. The alignment of international standards of what is acceptable behaviour by States and the claims of Indigenous peoples create an overwhelming imperative for reconciliation with Indigenous Australians.

Such reconciliation, to be meaningful and lasting, must involve the full recognition of identity rights. It must involve acknowledgment of the legitimacy of protecting Indigenous identity and cultures. It must involve assurances that governments will ensure the effective participation of Indigenous peoples in decisions that affect them, including the requirement of informed consent. It must involve the recognition of, and furthermore the facilitation of, Indigenous peoples' right to be self-determining.

Recognising identity rights in this way is consistent with theories of liberalism. As the Acting Social Justice Commissioner stated in the 1998 Native Title Report:

> Classical liberal thinking has always appreciated the need to balance the value of freedom against the prospect that the unrestrained exercise of freedom by one person, or group of persons, will impair or extinguish the exercise of freedom by another. This understanding, that within a social context individuals or groups are at risk of being discriminated against when a more powerful group is permitted an unfettered freedom to pursue its interests, is revealed in the writings of classical liberal thinkers such as Thomas Hobbes. Within the Hobbesian model the rationale behind a powerful law-making institution is the insecurity that citizens experience living in a 'free' world. The social contract proposed by Hobbes involves the individual giving up some of his/her freedom to the state in exchange for the state protecting the citizen from intrusion by others.
>
> Within this framework, equality would only justify the removal of rights or entitlements

[272] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Chapter 2.

[273] Havemann, P., 'Politicising and internationalising Indigenous people's rights claims' in Havemann, P. (Ed.), *Indigenous people's rights in Australia, Canada and New Zealand*, op cit, p183.

[274] *ibid*.

> when the exercise of such rights or entitlements are seen to harm and intrude upon another person or group of persons. Otherwise, where there is no such discrimination, and in keeping with the goals of our human rights system, the expression of one's cultural identity, no matter how different it might be from that of the majority, should not be interfered with.[275]

In many ways, the recognition of identity rights can also be seen to be analogous to the system of federalism. The recognition of identity rights adds a further dimension to power sharing arrangements amongst different layers and types of governance.

Significantly, Australian governments already *do* provide some recognition of the identity rights of Indigenous Australians. This recognition is grudging, limited in scope and in some cases with tightly proscribed limits. Examples of this include:

- the recognition by the federal government of the distinct cultures and identity of Torres Strait Islanders, as reflected by moves towards self-governance through the Torres Strait Regional Authority[276];
- the Aboriginal and Torres Strait Islander Commission, though its role is limited due to inadequate funding and government support;
- the recognition of native title, though the cumulative effect of the common law definition of native title and statutory limitations on the circumstances in which that title might be exercised suggest that native title is more a limiting doctrine than an emancipating one; and
- the acceptance of customary law in certain circumstances.

It is also reflected in the key recommendations of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Review of the Reeves Report, which recommended that there be no changes to the Northern Territory Aboriginal Land Rights Act without the informed consent of the traditional Aboriginal owners of the Northern Territory.[277]

Recognising the identity rights of Indigenous Australians is the challenge that faces Australia as we engage in the current formal process of reconciliation. Its significance cannot be underestimated. The current lack of recognition of the identity of Indigenous Australians manifests daily in the lives of Indigenous peoples, as is demonstrated in the first half of this chapter and by the statistical profile of Indigenous youth, and the disadvantage that they face, in

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[275] Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, *op cit*, p95.

[276] See for example: Government of Australia, Government response to Torres Strait Islanders' A new deal: A report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs on greater autonomy for Torres Strait Islanders, Parliament of Australia, Canberra, June 1998.

[277] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Unlocking the future: The report of the inquiry into the Reeves review of the Aboriginal Land Rights (Northern Territory) Act 1976, Parliament of Australia, Canberra, 1999, Recommendation 1.

chapter 2. As Brian Galligan and John Chesterman have stated:

> It has been said that relations between Aboriginal and non-Aboriginal Australians will be the thing most remembered about Australian history in the centuries to come. It remains to be seen whether Australia's shameful treatment of Aborigines will enter its fourth century and second millennium.[278]

[278] Chesterman, J and Galligan, B., *Citizens without rights – Aborigines and Australian citizenship*, Cambridge University Press, Melbourne, 1997, p222

Chapter 4: Bilingual Education

In December 1998 the Northern Territory Government announced that it was abolishing bilingual education programs in government schools in Aboriginal communities. The primary reason given by the government was the low standards of English literacy among Indigenous students. This announcement has been the catalyst for widespread debate within Indigenous communities, governments, education and human rights circles. This chapter places the debate on bilingual education programs within an international human rights framework. The Northern Territory Government's decision has overlooked difficult issues relating to systemic discrimination and the historical denial of rights to Indigenous people. Rights to education, language, respect for cultural difference, self-determination and native title are all raised by current and ongoing debates about bilingual education. The governments of the Northern Territory and the Commonwealth have a responsibility to support the principles behind bilingual education not only as a means to improve students' experience of and participation in the formal education system, but also in terms of valuing educators and supporting the maintenance of unique cultures and languages.

On December 1 1998 the Northern Territory Minister for Education and Training, the Hon Peter Adamson MLA, announced that bilingual education programs in government schools in Aboriginal communities in the Northern Territory were to be phased out. These programs are to be replaced by English as a Second Language (ESL) programs. The Minister stated that the decision was based on 'overwhelming concern for improvements in the English language' in those communities.[279]

For many Indigenous people this announcement was an example of ongoing attempts to undermine their right to control their own lives, by denying the choice of mode of education for their children and threatening the viability of remaining languages. It was also perceived that the decision was made without a genuine desire to address the systemic issues underlying the vastly disproportionate rate of participation in education by Indigenous children and young people.[280]

There are only certain parts of the Indigenous community for whom access to bilingual programs is an option,[281] given the widespread dispossession, forcible removal of children and subsequent loss of langu ge experienced by Australians as a consequence of past government policies and practices. Historically, many Indigenous children were forbidden to speak their own language by non- institutions in an attempt to erode the particular world view and value system those languages embodied, and to alienate those children from their families and cultures.

Nevertheless, this announcement has been the catalyst for a widespread, national debate on the adequacy of delivery of educational programs to Indigenous children. The issue of Indigenous children's right to access bilingual education where such a program is sustainable and supported by the local community raises a whole range of issues that have significance nationally.

This chapter does not intend to comprehensively evaluate the merits of various theories and models of bilingual education and learning English as a second language.[282] However, as the

[279] Hon Peter Adamson MLA, 'Planning for Growth: Outcomes of a Consultative Review of Education' December 1 1998, at <http://coburg.nt.gov.au/pfg/pfg_ed_speech.shtml> pp5-6.

[280] For example, see resolutions from the Northern Territory Constitution Convention, Batchelor College, December 1998, at <http://www.ozemail.com.au/~al4pozy/bilingual/constitution_convention_re.html>; and 'End Bilingual Phase Out', ATSIC media release, February 19 1999 at <http://www.atsic.gov.au/default_re.asp>.

[281] In the Northern Territory, 20 schools (including four non-government schools) officially have bilingual programs. Links to those schools can be found at <http://www.ozemail.com.au/~al4pozy/bilingual/index.html>. Certain Catholic and independent community schools in Western Australia also run bilingual programs. South Australia had 8 bilingual schools until the early 1990s, mostly in the Anangu Pitjantjatjara Lands. For further information see <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/parliamentary/language/50.html>.

[282] For research in this area, see Black, P., 'Bilingual Education in the NT: General Literature', Centre for Studies of

cuts to bilingual programs in the Northern Territory are based on arguments that the change will result in greater opportunities for Indigenous students, this chapter will reflect on how policy changes can fail to address the historical and political context of discrimination.

In the first part of this chapter I explain the benefits of bilingual education programs. In the second part I then examine the human rights implications of the Northern Territory government's decision to abolish these programs. I have chosen to extensively quote Indigenous people affected by the Northern Territory's policy announcement throughout the chapter.[283]

Part 1 – The benefits of bilingual education programs

Issues concerning the benefits of bilingual education generally fall into two inter-related categories, namely:

- The role of bilingual education in maintaining cultures, language and identity; and
- Bilingual education as an appropriate model for the delivery of educational services and outcomes to Indigenous children.

The role of bilingual education in maintaining Indigenous cultures, language and identity

> We have much to offer the people of the world. And language is at the heart of what we have to offer. If we lose that, we lose our culture. And if we lose our culture, you lose something that is unique.
>
> If the language is lost, the culture will be lost also: customs, tradition and law will be destroyed, because we also need to use the language of the law in politics and many other areas.[284]

Bilingual education programs acknowledge the importance of maintaining and valuing Indigenous languages, cultures and identity. Terralingua, an international non-government organisation dedicated to supporting linguistic diversity across the globe, highlights the international importance of these aims:

> peoples represent about 4 per cent of the world's population, but control or manage almost 20 per cent of the surface of the earth and speak at least 60 per cent of the world's languages. The fate of the lands, languages and cultures of Indigenous peoples is decisive for the maintenance of biodiversity and linguistic and cultural diversity. All three are correlated, maybe also causally connected through co-evolution, and all three are seriously threatened.
>
> Linguistic and cultural diversity may be eroding more rapidly than biological diversity. Languages, the carriers of culture, are today disappearing at a much faster pace than ever before, mostly as a result of linguistic genocide. The main agents of linguistic and cultural genocide today are mass media and formal schooling, along with market and other forces which shape these and other opportunities for the use of Indigenous languages outside the home.
>
> The formal schooling of Indigenous children is today conducted in most cases through the

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Language in Education, 1999, at <www.ntu.edu.au/education/csle/issues/ntbiling2.htm>.

[283] Throughout this chapter I refer to submissions made to the inquiry being conducted by the Human Rights Commissioner at HREOC into rural and remote education (herein Rural and Remote Education Inquiry).

[284] Letter from Mandawuy Yunupingu, former principal of Yirrkala Community Education Centre, read to Yirrkala community meeting, Rural and Remote Education inquiry, 12 May 1999, at <http://www.hreoc.gov.au/news_info/rural/nt/n1_9_6_4.html>.

> medium of a dominant language, not through the child's own language. Worldwide, the bulk of those Indigenous children who are in schools are judged to have 'failed' to achieve, and often are pushed out of the education system early. Later on, they are commonly overrepresented in figures for unemployment, youth criminality and other statistics that portray them as 'deficient' or 'deviant.'[285]

Bilingual education programs involve the teaching of Indigenous children in traditional languages. Children who participate in bilingual education programs are taught mainly in their first language in the early years of schooling, while this language continues to be used as a language of instruction in later years. As the child progresses through primary school, English plays an increasingly important part until it eventually becomes the main language of instruction. However, the Indigenous language continues to be recognised and used in the schooling program.

There are sound educational reasons for establishing literacy in the child's first language. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has explained the growing international acceptance of the importance of children learning in their first language as follows:

> It is now well established that early learning normally takes place through the medium of the mother tongue up to the operational stage, and one of the reasons why today's students have been falling behind or failing in many educational systems is that this fact has been disregarded. The mother tongue is what enables children to 'take off' intellectually once they start school. It provides a basic stability, without which children fail to develop, and it enables children to put their thoughts into words and to integrate harmoniously with the world around them. Children feel comfortable in their mother tongue, as they do in their parent's arms, and by denying them the opportunity to use this familiar linguistic support, so appropriate to their basic needs of self-expression and creativity, the school at once begins to hold them back.[286]

Terralingua have described the failure of many educational systems to teach Indigenous children in their own language as 'a persisting choice of an inappropriate language medium of education' and as 'the main pedagogical reason for "illiteracy" in the world.'[287]

The broad international acceptance of the evidence that a child learning in their first language is the most suitable form of education has led UNESCO to state that:

> In the light of this reality, there is no doubt whatsoever that, in the coming years, languages will become central to all major educational reforms that are being undertaken virtually throughout the world. Such near-unanimity is no accident, nor is it due only to the current convergence in cultural policies; it is rather the product of a new educational awareness fostered by the emergence of educational methodology as a scientifically based discipline and by the strong influence on education of applied psychology, which has underlined how vital the mother tongue is to the continuity of children's psychomotor, affective and cognitive development.[288]

The 1994 report of inquiry into Aboriginal and Torres Strait Islander language maintenance – conducted by the Standing Committee on Aboriginal and Torres Strait Islander Affairs and

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[285] Terralingua, *Linguistic human rights in education*, 15 May 1998, paras 2–4, quoted in United Nations Commission on Human Rights, *Review of developments pertaining to the promotion and protection of human rights and fundamental freedoms of people: Peoples – education and language*, UN Doc E/CN.4/Sub.2/AC.4/1998/2

[286] United Nations Educational, Scientific and Cultural Organization, *Methodological notes on linguistic reform to promote languages*, 12 May 1998, para 1, quoted in United Nations Commission on Human Rights, *ibid*

[287] Terralingua, *op cit*, para 5

[288] UNESCO, *op cit*, para 2

titled *A matter of survival* – also accepts this proposition. The report stated that:

> [I]t is totally inappropriate that any Aboriginal or Torres Strait Islander child today begins school in a language other than their own. It is destructive of both the language and the child. The committee recognises the difficulties in servicing multilanguage schools but does not believe this is an excuse for doing nothing. Bilingual/bicultural education is essential if strong and weakening Aboriginal and Torres Strait Islander languages are to be maintained.[289]

Bilingual education programs value and provide mainstream acceptance to Indigenous cultures and identity. Inclusion, and conversely exclusion, of learning in Indigenous languages through formal education processes sends a clear message to children, teachers and the community about the value that the wider society attaches to cultures. Inclusion within the formal education system provides validation to Indigenous cultural values, whereas exclusion provides greater value to other forms of knowledge. The phasing out of bilingual programs reduces the importance of the first language of a community to an informal level, reducing the essentiality of that language.

As a staff member of Batchelor College, an Indigenous run and owned college in the Northern Territory, stated:

> Aboriginal staff and students and lecturers when they are in [Batchelor] college have all been opposed to this move to weaken bilingual education, and to seeing that there is some sort of quick fix that is intended to make for an English-only curriculum that might see Aboriginal people advancing more rapidly into those areas of education and training that they aspire to. Aboriginal people are very strong within the college at saying that – 'This is about an expression of our own culture, our own ideas'. Bilingual education is critical to saying that.
>
> Making those decisions to cut those programs is saying that their own language and the expression of their own language is somehow less important than English, whereas the 'both ways' approach that Batchelor has always had as its guiding philosophy says that one is as important as the other and that people need to be able to move in and out of cultural situations competently and with skill, and that it is not going in one direction at the expense of the other. So there is great support for maintaining a bilingual program that gives Aboriginal people strength and expression in their own language and culture as well.[290]

For Indigenous people, the threat that the everyday use of their languages could be eroded is about more than a linguistic loss. It is also the potential loss of a unique world view, and the history and culture that the language embodies.

As the Canadian Royal Commission into Aboriginal Peoples noted:

> Most people find it impossible to separate language and identity. Language is perceived as the quintessence of a culture. It expresses a unique way of apprehending reality, capturing a world view specific to the culture to which it is linked. But language is connected to identity in another important way: its presence and use in a community are symbolic of identity, emblems of group existence. Using a language is the ultimate symbol of belonging.[291]

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[289] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Language and culture: A matter of survival*, Report of the inquiry into Aboriginal and Torres Strait Islander Language Maintenance, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/parliamentary/language/74.html> (Herein, *A matter of survival*).

[290] Senate Employment, Workplace Relations, Small Business and Education References Committee: Inquiry into Indigenous Education, *Hansard*, Alice Springs, 6 August, 1999, p242.

[291] *Gathering Strength*, Volume 3, Report of the Royal Commission on Aboriginal Peoples, Canada, 1996, p612.

The learning and use of a language depends on factors that are not solely linguistic, but also political, economic and cultural. One of the most important ways to keep a language alive and valued is to have it as an important part of children's formal education experience.

> It seems that languages are worth what the people who speak them are worth. It is time to revalue the worth of Indigenous Australian languages and value the knowledge that Aboriginal children who speak their own languages bring to school. Bilingual programs are not costly compared with the cost of other language learning in this country. If the few remaining languages spoken by children are lost, it will be forever.[292]

This also has been recognised by the Standing Committee on Aboriginal and Torres Strait Islander Affairs in *A matter of survival*. The Committee's inquiry had been initiated 'because of widespread concern over language loss amongst Aboriginal and Torres Strait Islander people'. The inquiry recognised that:

> The importance of a language to its speakers and descendants is much more significant than the linguistic aspects alone (because) language goes to the very core of a person's identity.[293]

> Schools have a very large impact on language and in the past this has been a quite destructive one. It is important that they play a constructive role in language maintenance wherever possible. A major way in which schools have been involved in language maintenance has been through bilingual education.[294]

Bilingual education programs also play an important role in promoting the involvement of Indigenous communities in the education process.

> We get our elders involved in teaching our children, our children learn Warlpiri, learn about our culture and it makes them proud of themselves, of who they are. It is really important that bilingual education is not stopped. It shouldn't be stopped.[295]

Professor Peter K. Austin, President of the Australian Linguistic Society, states that bilingual education programs have also allowed the entry of Aboriginal people into schools in a way that truly values their knowledge and skills, and accords them dignity.[296] Accordingly, bilingual education can also be seen to empower Indigenous students and teachers.

Sister Anne Gardiner, who has spent 33 years working on Bathurst Island as school principal (including a six year period in Nauru), gave evidence to the Inquiry into rural and remote education conducted by the Human Rights Commissioner at HREOC. On her experiences she stated:

> When I came back from Nauru and bilingual education had commenced, suddenly I couldn't read what was going on in the early childhood. I couldn't follow that the power lay in the hands of teachers but it took me time to go through that. What I saw happened was the self-esteem and the ownership not only of their language but the beginning of the ownership of their school, the difference in the children - suddenly they had a language that they could speak in and they could write in, and, to me, these are the educational values that

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[292] Nicholls, C., 'Youth Supplement', *Rights Now*, June 1999, p13.

[293] *A matter of survival*, at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/parliamentary/language/18.html>.

[294] *A matter of survival*, at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/parliamentary/language/26.html>.

[295] Lajamanu hearings, Rural and Remote Education inquiry, 13 May 1999, at <http://www.hreoc.gov.au/news_info/rural/nt/nt1_9_6_9.html>.

[296] Letter from Professor Peter Austin to the Hon. Peter Adamson, Minister for Education, Northern Territory Government, reprinted at <http://www.dhanhan.com/vl/alert_2.htm> p6.

we should be looking at at this time.[297]

The way in which bilingual education empowers Indigenous students can be contrasted to the disempowerment experienced through mainstream educational processes. As Jack Beetson has noted:

> Non-education systems have been deeply implicated in the systematic efforts to take from us our languages, our cultures and our children, and therefore our essential identities as indigenous peoples. In Australia, the 1989 Royal Commission into Aboriginal Deaths in Custody concluded that the mainstream education systems had been either unable or unwilling to accommodate many of the values, attitudes, codes and institutions of Indigenous society. The Commissioner expressed his strong support for 'the expressed desire of Indigenous people for education and training which will support their aspirations for self-determination' and called for a 'concerted and comprehensive commitment to the development of appropriate education and training programmes which are accessible, both geographically and culturally, to the greatest number of peoples possible.'[298]

A further dimension of bilingual programs is that through maintaining language and culture, they can contribute to the maintenance and knowledge of Australia's heritage. Bilingual programs have encouraged collaborative work between Indigenous people and researchers in documenting knowledge which is of great scientific value, and in the case of plants, potentially of great economic value.[299]

Bilingual education as an appropriate model for the delivery of educational services and outcomes to Indigenous children

Debates surrounding the appropriateness of bilingual education have focused on issues concerning the adequacy of these programs in terms of educational outcomes for Indigenous students, particularly standards of literacy. As the Standing Committee on Aboriginal and Torres Strait Islander Affairs stated in *A matter of survival*:

> As with Aboriginal education generally, bilingual education reflects the tensions which exist between the acquisition of knowledge and skills to allow Aboriginal people to live without disadvantage in the wider society on the one hand, and the retention of Aboriginal culture on the other.
>
> Much debate about bilingual education has taken place between those who see bilingual education merely as an effective way of developing literacy in English ('transfer' model of bilingual education) and those who see bilingual education as being an important means of maintaining Aboriginal language and culture while also enabling the acquisition of literacy in English (a 'maintenance' model of bilingual education).[300]

The discussion of the benefits of bilingual education with regard to the maintenance of Indigenous languages, cultures and identity (as above) conceives of bilingual education within a maintenance model. The Northern Territory Government's decision to abolish bilingual programs focused primarily on the outcomes in relation to English literacy, showing a presumption of the transfer-to-English model of education. This negates the language, culture,

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297 Sister Anne Gardiner, evidence to Public Hearing, Darwin, Rural and Remote Education inquiry, 10 May 1999, at <http://www.hreoc.gov.au/pdf/rrl_9_6_1.pdf>

298 Federation of Independent Aboriginal Education Providers, *peoples and our right to an independent education system*, 6 May 1998, para 5; reproduced in United Nations Commission on Human Rights, *ibid*.

299 Letter from Professor Peter Austin to the Hon. Peter Adamson, Minister for Education, Northern Territory Government, reprinted at <http://www.dnathan.com/vl/alert_2.htm> p6.

300 *A matter of survival*, at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/parliamentary/language/50.html>

and identity dimensions of bilingual education programs:

> [The existing bilingual] model was adopted based on the theory of the day on bilingual education, which said that first language knowledge was transferable to the learning of English. The transference theory is no longer the main reason for continuing a bilingual model in the school. Education in both Aboriginal languages and English is considered to be of great value in the struggle for self-determination by future generations within the community.[301]

A matter of survival strongly supported the maintenance model. The report included recommendations that the Minister for Employment, Education and Training in cooperation with the relevant state and territory ministers:

- ensure that bilingual or bicultural education be provided to all Aboriginal or Torres Strait Islander children whose first language is other than English if sought by the relevant community and if there is a sufficient number of speakers to support a program (Recommendation 27);
- ensure that Aboriginal and Torres Strait Islander language communities serviced by a school determine which model of language teaching is appropriate for their school (Recommendation 28); and
- ensure that bilingual education is clearly based on the maintenance model rather than the transfer-to-English model (Recommendation 29).

The Committee stated that 'language objectives on bilingual/bicultural schools are not just to provide a supportive linguistic environment when children first came to school but also to build their language skills and develop literacy in their language'.[302]

As a replacement for bilingual education, the Northern Territory Government has suggested English as a Second Language (ESL) programs. As many academics and educators in the field point out, ESL principles should already be an integral part of bilingual education programs:

> The basic premise of bilingual education is that it is imperative that Aboriginal children, like all other Australian children, acquire fluency in English. Bilingual education programs implicitly acknowledge that acquisition of literacy in one's second or third language doesn't need to be at the expense of one's first language, a finding backed by a mountain of research. The worst possible scenario for children is for both the first and second language to be substandard and this easily can happen if the second language is imposed at the expense of the first.
>
> English-as-a-second-language programs are therefore a critically important part of any bilingual program in Aboriginal Australia. In fact, in most of the Territory's bilingual schools, on average more than two-thirds of every school day is spent teaching the children in English. Effective bilingual education programs, as the name implies, actively employ two languages.[303]

When governments are constantly setting literacy targets and pledging funds to improve the prospects of Indigenous students, it becomes the perception in non-Indigenous Australia that the responsibility for the lack of improvement must somehow lie with parents or communities generally. While it is widely acknowledged that erratic and low attendance is a crucial factor

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[301] Bowman, C., Pascoe, L., Maningrida, T. J., 'Literacy Teaching and Learning in a Bilingual Classroom' in (ed) Wignell, P., *Double Power: English Literacy and Education*. Language Australia, Melbourne, 1999, p62.

[302] *ibid*.

[303] Nicholls, C., 'Youth Supplement', *Rights Now*, July 1999, p12.

prohibiting some Indigenous students from progressing in the formal education system, it is important to tackle the root of the cause. This is not done through blaming parents, but through recognising the historical disempowerment of people in the Northern Territory:

> [It] needs to be noted that improved English literacy and numeracy outcomes is not incompatible with bilingual education or using the school curriculum for the maintenance of Aboriginal languages – results in non-bilingual schools are no better than for bilingual schools – the debate about bilingual education, whereby one of the genuine innovations of the last 20 years is blamed for the failure of a system, has diverted attention from the range of causes of low outcomes, from the increased effort required in English as a Second Language provisions and from the fact that adjustments to the mainstream will probably not be 'the solution'.[104]

The success of bilingual programs, and English as a second language for that matter, will also be dependent upon the skills of the teachers. Many teachers in remote Indigenous communities have not had appropriate training to adequately teach children for whom English is not their first language:

> Very few teachers in bilingual schools have ESL qualifications. Compulsory ESL qualifications for all non- teachers working in Aboriginal schools would be an astute move to improving English literacy.

> There is only a one-week training course in Darwin for teachers who go out to Aboriginal schools. English is a second language for most children in remote communities. I think we need to recognise that we do not expect newly arrived immigrant children in capital cities in Australia to attain English without receiving targeted help. Why would we expect this of Australian children who are born speaking an Australian language that happens not to be English?[105]

Effective teaching within bilingual programs requires a recognition that English is not the first language of the community:

> [I]t is unfortunate that, up until now, there has been little recognition either at the official level or among the often inexperienced white teachers appointed to these schools that English is a foreign language for these children when they start school. However, only a tiny minority of their teachers have English-as-a-second-language qualifications. What is required is more effective instruction in English, not more time spent by teachers speaking English at children who just don't understand it.[106]

Bilingual education is still conducted largely in a non-Aboriginal way by largely non-Aboriginal teachers with speakers as teaching assistants. This indicates that there is a dire need for Indigenous people to be trained to teach and assist in teaching in their own communities.

Not only do they often share the children's first language, Indigenous educators from those communities can also provide insight and an example of how to straddle different languages and cultures, if they are trained, valued and supported adequately. Mandawuy Yunupingu, a former principal of Yirrkala Community Education Centre, has often spoken of the issues faced by Indigenous people training to be teachers, and the cultural assumptions that prevail in the formal education system in Australia:

> [While studying in the Deakin, Bachelor Aboriginal Teacher Education program] I wrote one essay in Gumatj, my own language. I did this for three reasons. I wanted to pinpoint the area of language, to show how deep my thinking could be in my own language. I felt that I

[104] Bachelor College interim submission, Rural and Remote Education inquiry, May 1999, p4.

[105] Lowell, A. and Garrutju, J., quoted by Senator Lyn Allison, *Hansard*, Senate, 28 April, 1999, p4441.

[106] Nicholls, C., 'Youth Supplement', *Rights Now*, July 1999, p12.

> couldn't get across the ideas that I wanted to express if I had to do it in English without losing most of the meaning. I could have translated it into English words but I would have been left with just the words, the meaning I could make in my own language would have been lost.
>
> At the same time I wanted to put my Balanda educators in the position that Aboriginal kids going to Balanda schools for the first time were in, being confronted with a language they couldn't understand. I also wanted to have a bit of a dig at the Balanda to see what they made of it and to make the point that nobody there was competent to assess it.[107]

Bilingual education programs have tangible long-term benefits in their employment of Indigenous people as teachers, principals and Aboriginal education workers. In April 1999, the Northern Territory Minister for Education Peter Adamson acknowledged Batchelor College's success in particular, referring to the 'cultural imperatives of two-way philosophy' and citing the fact that 83% of its graduates are in full-time employment as a measure of the success of that philosophy.[108]

However, training, resources and ongoing support for Indigenous teachers and principals is limited. The ratio of students to teachers means that students do not get the individual attention they may need both to encourage regular attendance and improve English literacy and numeracy standards. Aboriginal and Torres Strait Islander Education Workers (AIEW) in particular, who play a crucial role both in assisting teachers and in community liaision, work in poorly paid positions not covered by teacher unions. The role of an AIEW also typically includes curriculum development work, classroom management assistance and translating and interpreting for staff and community members. As often the only Indigenous educators in a school, AIEWs can also be called upon to provide language, literacy and cultural awareness activities within the school.[109] It is this important role many Indigenous communities feared would be lost with the abolition of bilingual education programs:

> [N]ot only is [the bilingual education program] about valuing students' first language and those educational reasons, as well as saving our national heritage, it's also about employment of educators and providing meaningful employment for Aboriginal people in their own communities - we have people working as literacy workers, as assistant teachers and in a range of other positions, including teacher linguists, who are facing the chop as a result of this decision, despite what the Department of Education may say about retention of positions, because it is the most casualised workforce that we have coverage of - 48% of assistant teachers work on a part-time basis, so that's a real fear... we think that recognising real career structures for educators provides a role model and one way out of or one way through this cyclic problem that has been identified of low expectations.[110]

Team teaching between and non-Indigenous teachers has evolved into some models for bilingual education programs. For example, in Maningrida, Arnhem Land, there are five Aboriginal teachers who teach within different team situations. In some cases, a first language speaker of English has teamed with a first language speaker of an Aboriginal language:

> When we are teaching in the class together, even when we are teaching English, I can help the children more by explaining concepts, ideas and words used in English to them in Burarra. It helps them to understand the English and we can learn about more difficult

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[107] Mandawuy Yunupingu, 'Double Power' in (ed) Wignell, P., *Double Power: English Literacy and Education*, Language Australia, Melbourne 1999, p3.

[108] Quoted in Devlin, B., 'Northern Territory Aboriginal Education in 2010', submission to Collins Inquiry, provided to Rural and Remote Education inquiry, May 1999, p6.

[109] Rural and Remote Education Briefing Paper: Aboriginal and Islander education workers <http://www.hreoc.gov.au/news_info/rural/briefing/n1_9_14_7.html#7.2>

[110] Robert Laird, President, NT branch, Australian Education Union, Public Hearing, Darwin, Rural and Remote Education inquiry, 10 May 1999, at <http://www.hreoc.gov.au/news_info/rural/nt/n1_9_6_1.html>

> things. I can tell them what we want in Burarra and then scaffold their English when they talk. The children feel comfortable with this way, they don't get frustrated and switch off, they stay interested and will contribute to the lesson.[111]

As well as making the classroom more conducive for learning, there are greater prospects for Indigenous people who leave school with a solid bilingual education for work in health and other services, land councils, and as interpreters in court and elsewhere. The right to an education that recognises and incorporates cultural and linguistic traditions for Indigenous children is inextricably linked to the realisation of other human rights.

Part 2 - Bilingual education and human rights

The decision of the Northern Territory government to abolish bilingual education programs in government-run Indigenous community schools raises concerns with regard to a number of Australia's human rights obligations. These obligations can be grouped under the following three principles:

- The right to education;
- Recognising cultural difference; and
- Self-determination and effective participation.

The right to education

> The right to education... is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.[112]

Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that 'the parties to the present Covenant recognize the right of everyone to education.' Article 13(2) provides that Parties to the Covenant recognize that, 'with a view to achieving the full realization of this right... Secondary education in its different forms... shall be made generally available and accessible to all by every appropriate means...' Article 28 of the Convention on the Rights of the Child provides for the right of children to education in similar terms.[113]

There are two key features of the right to education that relate to bilingual programs. These are the obligation on States to progressively and equally realize the full enjoyment of the right to education, and the requirement that education shall be made accessible by all appropriate means.

The principle of progressive realization was discussed in chapter 2 of this report. As noted, Article 2(1) of ICESCR requires States to take steps, to the maximum of available resources, to progressively realize the rights recognised in ICESCR – including the right to education.[114] States must demonstrate that they are moving as expeditiously as possible towards such realization, and that, in the process of doing so, they are providing a core minimum level of

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[111] Bowman, C., Pascoe, L., Maningrida, T. J., 'Literacy Teaching and Learning in a Bilingual Classroom' in (ed) Wignell, P., *Double Power: English Literacy and Education*, *op cit*, p68.

[112] Committee on Economic, Social and Cultural Rights, *General Comment 11*, 10 May 1999, UN doc E/C.12/1999/4, para 2.

[113] See in particular Convention on the Rights of the Child, Article 28(1)(b). The right of the child to education is to be provided 'progressively and on the basis of equal opportunity'.

[114] This requirement is reaffirmed in Article 13 in relation to the right to education.

enjoyment of rights. Article 2(2) of ICESCR also requires that States take action to ensure adequate development and protection of Indigenous peoples, or other groups who do not enjoy a position of equality in relation to the rights recognised in ICESCR, in order that they may fully and equally enjoy the right to education.

As was noted in chapter 2, the level of disadvantage faced by Indigenous people in the educational system, and in other areas, may indicate that Australia is not meeting these obligations.

It is in this context that the abolition of bilingual education programs must be considered. Bilingual education programs recognise the distinct cultures and identities of Indigenous peoples. They offer the type of protection to people that is envisaged by Article 2 of ICESCR.

The removal of such protection, by abolishing bilingual education programs, must be justifiable in terms of the principles of the Convention. It is difficult to characterise the decision of the Northern Territory government as beneficial and within the terms of ICESCR, for the reasons outlined below concerning the appropriate recognition of cultural difference and standards of effective participation.

The second principle concerning the right to education is that of accessibility. The Committee on Economic, Social and Cultural Rights has explained the concept of accessibility of education as follows:

> [T]he form and substance of education, including curricula and teaching methods, has to be acceptable (eg relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents...[115]

This requirement is also reflected in the aims of education, as set down in Article 29(1) of CROC. Article 29(1)(c) states that the education of a child shall be directed to 'the development of respect for the child's parents, his or her own cultural identity, language and values.'

The Standing Committee on Aboriginal and Torres Strait Islander Affairs has identified the implications of these requirements as follows:

> [E]ducation should be available to Aboriginal and Torres Strait Islander students in a way which reinforces rather than suppresses or contradicts their unique cultural identity. This includes an understanding and respect for their home language.[116]

As noted in the first part of this chapter, bilingual education has a significant role to play in the maintenance of Indigenous languages, cultures and identity. It can clearly be seen as promoting a form of education that is accessible.

The requirement to provide education that is accessible, however, is not merely aspirational. Article 13(2) of ICESCR (and Article 28(1)(b) of CROC) require that education be made accessible 'to all by every appropriate means' (emphasis added).

Accordingly, States must be able to demonstrate that they are using every appropriate means to ensure that education is accessible. It is doubtful that the removal of bilingual education programs can be seen to meet this obligation, particularly given that Indigenous peoples do not equally or fully enjoy the right to education and that they clearly oppose the abolition of such

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[115] Committee on Economic, Social and Cultural Rights, *General comment 13: The right to education (Article 13)*, Unedited version, Adopted 21st session, 1999, para 6c.

[116] *A matter of survival* at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/parliamentary/language/50.html>

programs.[117]

Recognising cultural difference

> This is what we've got to teach children in our first language. There's contents such as social education, bush medicines as a topic, kinship and relationships, history of our land, significant things. What created the land, that's part of our culture and language. It goes hand in hand.[118]

In chapter 3 of this report I considered an integral feature of the principles of equality before the law and non-discrimination, namely, the legitimacy of appropriately recognising cultural difference. Bilingual education programs recognise cultural difference in a manner that is non-discriminatory in international law.

The Committee on the Elimination of Racial Discrimination, which was created under and monitors implementation of the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD) has recognised that measures that seek to protect the culture and identity of Indigenous peoples may constitute a legitimate, non-discriminatory differentiation of treatment, and fall within Article 5 of the Convention. The Committee has indicated that CERD places obligations on governments to take all appropriate means to combat and eliminate discrimination against Indigenous peoples:

> 1. [T]he Committee has consistently affirmed that discrimination against peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.
>
> 3. The Committee is conscious of the fact that in many regions of the world Indigenous peoples have been, and are still being, discriminated against and deprived of their hum[...] rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.
>
> 4. The Committee calls in particular upon States parties to:
>
> a. recognize and respect distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation, ... [and]
>
> e. ensure that communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[119]

Article 5 of the *Convention against Discrimination in Education*, to which Australia is a signatory, also provides that 'it is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language.'[120]

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[117] This lack of consent is discussed further below under the heading of self-determination and effective participation.

[118] Rosalind Djuwandaynga, Darwin Hearing, Rural and Remote Education inquiry, 10 May 1999, p69, at <http://www.hreoc.gov.au/news_info/rural-n/r1_9_6_1.html>.

[119] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, UN Doc CERD/C/51/Misc.13/Rev.4, 18 August 1997, para 3.

[120] This provision is subject to the requirements that as a result, participants are not prevented from participating in the wider community, that they are not consequently provided with a lower standard of education, and that their participation is voluntary. Bilingual education, as a program, does not of necessity impinge upon these requirements.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 30 of CROC also provide that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

In its General Comment on Article 27 of the ICCPR, the Human Rights Committee noted:

> Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.[321]

> Article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[322]

Bilingual education is an important means of maintaining and revitalising language and cultural traditions through the formal education system, valuing them and passing them on to younger Indigenous people. It is consistent with the above principles that Australia is obliged to meet.

As I discussed in chapter 3, there are certain circumstances where a failure to recognise cultural difference may amount to discrimination and perpetuate existing inequality. Accordingly, in certain circumstances, the principles outlined above are stronger than merely accepting that States *may* recognise cultural difference if they so choose. They actively require States to recognise such difference. The significance of this is the difference between the State being able to maintain appropriately targeted bilingual education programs and being *required* to do so.

In my view, the obligation on Australia extends to the requirement that existing bilingual education programs be maintained. The failure to do so, amounts to a perpetuation of the discriminatory treatment of Indigenous peoples. As Terralingua have explained, mainstream or dominant educational systems tend to legitimize inequality within the educational system:

> Indigenous people's ability to make free, informed educational choices is mainly hampered by ideologies that stigmatize and devalue these groups' languages, cultures, norms, traditions, institutions, level of development, ... while glorifying those of the majority/dominant group. These ideologies rationalize and legitimate the unequal relationship between the dominant and the dominated, by portraying the actions of the dominant group as always functional, as well as beneficial to the subordinated group, who are instead portrayed as 'primitive', 'backward', not able to adapt to present technological information society. Such ideologies also diagnose the problems Indigenous children face at school as due to the children's, their parents' and their groups' 'deficient characteristics'.[323]

Accordingly, the failure of Indigenous children in the school system is blamed on these so-called 'deficient characteristics' which range from:

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[321] Human Rights Committee, *General Comment 23*, 8 April 1994, para 6.2, in Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1, p40.

[322] *ibid*., para 9.

[323] Terralingua, *op cit*, para 11.

> 'second language related deficiencies' (the children do not know the dominant language well enough), 'cultural deficiencies' (the parent's culture is not conducive to supporting school achievement), 'social deficiencies' (the parents represent low-ranking social groups), and even 'first language-related deficiencies'.
>
> The 'remedies' adopted by most majority educational systems have been geared towards 'helping' children to overcome their deficiencies. These 'remedies', based on a wrong diagnosis of the problem, try to 'remedy' the child, parents and the Indigenous community, instead of changing the educational system. The evidence shows that such measures do not work. Furthermore, they do not respect linguistic human rights in education.[324]

A failure to maintain bilingual education programs can therefore be seen as a failure to redress inequality, and consequently as a perpetuation of discrimination against Indigenous people, in breach of the requirements set out above.

The failure to maintain bilingual programs may also be discriminatory through its impact on the enjoyment of human rights in other areas, such as native title. Native title is relevant to the retention of bilingual education programs on the basis that language is a significant factor by which native title claimants are able to demonstrate a continued observance of traditional laws and customs.

In the Miriuwung Gajerrong case,[325] Justice Lee found that maintenance of language was of primary significance in determining an ongoing connection between native title claimants and their traditions and customs. Justice Lee stated:

> ...the existence of the Miriuwung and Gajerrong languages, and the use thereof by Aboriginal people, indicated the continuing existence of an identifiable Aboriginal community and of the maintenance of connection with land with which that group had been associated by repute.[326]
>
> The witnesses who identified themselves as Miriuwung or Gajerrong did so not because they, or their forebears, spoke the Miriuwung or Gajerrong languages but because those languages were part of their connection with forebears and with the land. The mutual possession of a language connected with the land was an incident of identification of the community as was mutual recognition of membership of that community, mutual acknowledgement and observation of traditional law, customs and practices, and the recognition by others of the existence of community.[327]

This current threat to language maintenance in the Northern Territory formal government education system can be seen as an indirect attack on native title, if it transpires that future generations of Indigenous peoples are judged by Australian law not to have adequate knowledge of their traditional language and consequently cannot prove an ongoing connection to their land.

A further dimension of bilingual education programs that is supported by international law is that the right to education, in Article 13 of ICESCR, extends to the right of older Indigenous peoples to participate in education:

> Article 13, paragraph 1, of the Covenant recognizes the right of everyone to education. In the case of the elderly, this right must be approached from two different and complementary points of view: (a) the right of elderly persons to benefit from educational programmes; and (b) making the know-how and experience of elderly persons available to younger generations.

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[324] *ibid*.

[325] *Ward v Western Australia* (1998), 159 ALR 483 (Miriuwung Gajerrong case), per Lee J.

[326] *ibid*, p523.

[327] *ibid*, p. 525.

> With regard to the use of the know-how and experience of older persons... attention is drawn to the important role that elderly and old persons still play in most societies as the transmitters of information, knowledge, traditions and spiritual values and to the fact that this important tradition should not be lost. Consequently, the Committee attaches particular importance to... 'Educational programmes featuring the elderly as the teachers and transmitters of knowledge, culture and spiritual values.'[128]

As discussed in part one of this chapter, bilingual education programs are capable of facilitating such participation.

Self-determination and effective participation

> Self-determination to me is about choice. Unfortunately, in the Aboriginal community, regardless of what the issue is but, in particular, education, Aboriginal people seem to have very limited choice. In fact, the choices that we make, if we do get to make a choice at all, are very directly steered by government – government departments and so on – and other agents of government that are out there... [They] are sitting there saying that Aboriginal self-determination is what underpins their policy [but] ... what they do is determine policy that restricts our right to choice, our right to access an education that is determined by us.'[129]

In chapter 3 I outlined the principles of self-determination and effective participation. I noted that the right of self-determination applies to Indigenous peoples, and that various manifestations of this right are set out in the Draft Declaration on the Rights of Peoples.[130]

The Draft Declaration highlights the manner in which rights to education, language and culture are integrally linked to the principle of self-determination. The Draft Declaration provides that Indigenous peoples have the following rights:

- to practice and revitalize cultural traditions and customs (Article 12);
- to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies (Article 13);
- to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures (Article 14); and
- to all levels and forms of education of the State. All peoples have the right 'to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning' (Article 15).

As Jack Beetson has noted:

> Indigenous education and Indigenous self-determination cannot be separated. Genuine education only happens when people have real power over the education process. Article 3 of the draft declaration states very simply, in the same terms ... as those in the (ICCPR and

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[128] Committee on Economic, Social and Cultural Rights, *General Comment 6 – The economic, social and cultural rights of older persons*, 8 December 1995, Contained in UN Doc E/1996/22, paras 36, 38.

[129] 'Education for Self-Determination: A Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody in relation to Aboriginal Community-Controlled Adult Education', a project report to AIATSIS from the Federation of Independent Aboriginal Education Providers (FIAEP) Ltd., submitted to the Senate Employment, Workplace Relations, Small Business and Education References Committee Inquiry into Indigenous Education in July 1998, p184.

[130] As I noted in chapter 3, the Draft Declaration does not create rights for indigenous peoples but indicates ways in which existing standards apply to the situation of Indigenous peoples.

> ICESCR), our right to self-determination. This means we have rights to freely determine our own development paths and, as Indigenous peoples, our needs and aspirations do not always coincide with the development framework pursued by the dominant society.[331]

Put differently, the right of self-determination as it relates to education provides Indigenous peoples with the 'right to learn from their own experiences, their own culture; their right to read the world, as Friere called it, with one's own framework, rather than one imposed from outside.'[332]

I also noted in chapter 3 that standards of effective participation and informed consent have been read into Australia's international obligations under Article 5 of CERD and Article 27 of the ICCPR. This is additional to the right to self-determination as set out in the Draft Declaration and Article 1 of ICESCR and the ICCPR.

The Committee on the Elimination of Racial Discrimination, for example, has called on State parties to 'recognize and respect distinct culture, history, language and way of life' and to 'ensure that members of peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.'[333]

The decision of the Northern Territory government to abolish bilingual education programs was made without adequate consultation on the effectiveness of or support for those programs. Concerns that Indigenous people in the Northern Territory had about low standards of English literacy and requests that better ESL principles to be incorporated into bilingual schools were translated into the abolition of bilingual programs altogether. As Bob Boughton noted:

> This is the kind of executive-level decision-making which is calculated to *disempower* the community, while it justifies itself as if it were contributing to the community's empowerment (by adopting policies to increase English literacy). At the very least, if the Minister and his advisers were convinced of the need for a change in policy, they had a duty, including under the Indigenous Education Agreement the Secretary had signed with the Commonwealth, to discuss that firstly with the IEC [Education Council] NT, and seek their support.
>
> They might also reasonably have been expected to consult those other affected bodies which they themselves nominated as the bodies through which they had implemented the relevant recommendation of the Royal Commission Into Aboriginal Deaths In Custody, such as the School Councils and ASSPA Committees of the affected schools, and the Education Standing Committee of the NT Board of Studies.[334]

The Northern Territory Constitutional Convention at Batchelor, attended by a significant number of communities in the Northern Territory, clearly expressed the view that they did not support the abolition of bilingual programs:

> This convention further declares that the NT Administration decision to remove bilingual education programs, announced by the Hon. Peter Adamson, MLA, is a denial of our right to education, an attack on Aboriginal cultures, and a retrograde step in providing equitable education services to the Aboriginal citizens of the Northern Territory.
>
> This Convention notes that views expressed by Aboriginal people to the Education Review

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[331] Federation of Independent Aboriginal Education Providers, *op cit.*, para 3.

[332] *ibid*, para 2.

[333] Committee on the Elimination of Racial Discrimination, *General recommendation XXIII - Indigenous Peoples*, *op cit*, paras 4(a), (d).

[334] Boughton, B., 'Strategies to Overcome Institutional Racism in Education: A Submission to the Collins Review of Aboriginal Education in the NT', copy provided to the Rural and Remote Education Inquiry, p7.

> to do with our dissatisfaction with the education system, have been misused and distorted to justify the removal of bilingual education.[135]

The decision to abolish bilingual education programs was not made with the informed consent and effective participation of those Indigenous people in the Northern Territory who will be affected by the decision. It is inconsistent with the right of self-determination and other standards, mentioned above, of the international human rights system.

It is also inconsistent with the consistently expressed desires of Indigenous people in the Northern Territory for greater community control over educational processes: people have:

> [s]aid consistently that the capacity to ... design and deliver their own educational programs based on their communities' priorities, needs and aspirations, was essential to achieving genuine self determination, and that without control over their own education Aboriginal people are unable to develop their capacity to be self-determining and to exercise their right of self-determination through their own community-controlled organisations. ... Aboriginal-controlled education and Aboriginal self-determination, in other words, are two sides of the same coin.[136]

In the context of bilingual schools in the Northern Territory, the concept of self-determination has significance in the progressive handing over of decision-making and control of educational issues by the Northern Territory and Commonwealth Governments to Indigenous communities.[137] This would not necessarily mean that such things as English literacy would become less of a priority or concern, but it could mean greater input into and control by Indigenous communities of the education of their children. This could include the teaching of their own languages and cultures as well as equipping their children to fully participate in wider Australian society.

Communities could decide that they do not want their language taught or incorporated into the formal education system, and that their local schools should teach only in English. That is also their right. But what is crucial in this process is for communities to have access to all of the relevant research and information regarding bilingual education, including their rights under international law. They should not have to choose between their children gaining a reasonable standard of English literacy or learning in their own language.

> We came here to Willowra for our (annual) Warlpiri Triangle meeting (of Warlpiri educators)... We talked one after another about how we want to keep our language and culture strong forever, without losing it. ... We want our children to keep their father's father's and their mother's father's Dreamings strong forever, without losing it.
>
> In the old days, Warlpiri people walked and lived from place to place out bush on their own country, without any knowledge of White people's ways. The people who came after them entered school as children, where they had to speak only English. If they spoke Warlpiri in school, the teacher would make them stand in the corner. Today, our children are taught in schools by both Warlpiri teachers and White teachers, both ways...
>
> We talked about our children reading in Warlpiri first and in English second, afterwards. Our children understand English words only little by little, but they understand Warlpiri

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[135] Northern Territory Constitutional Convention, Batchelor College, December 1998, Resolution 20.

[136] 'Education for Self-Determination: A Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody in relation to Aboriginal Community-Controlled Adult Education', *op cit*, p184.

[137] There has been government recognition of the benefits of increased community involvement and control in redressing Indigenous disadvantage. For example, the *Desert Schools Report: An investigation of English language and literacy among young Aboriginal people in seven communities*, AIATSIS, Canberra, 1996, was a Commonwealth-funded extensive study, of which principal recommendations focused on strengthening the involvement of communities in the education process.

> completely. If they learn to speak and read Warlpiri first, later they will understand and read English well.
>
> Those children who went through Bilingual Education, starting in 1974, are now young adults, and because of Bilingual Education they can read and write and speak really strongly in both Warlpiri and English. When our children see us teachers working and speaking strongly, then they will be strong themselves.
>
> We will continue to teach English, we are only asking for us to be able to go on teaching Warlpiri too, so that we can teach our children Two Ways, in both English and Warlpiri.[138]

Conclusion

Indigenous people want education to prepare their children to participate fully in Australian society. Integral to this is the strong desire for education to support Indigenous cultural traditions and a positive identity for children and young people. Current education practice does not fulfil either of these goals. The failure of Indigenous students to complete basic levels of schooling amounts to a crisis for future generations. There is a critical need for fundamental changes to the way Indigenous children are schooled, so that the education system can function as a vehicle for cultural and economic renewal for communities.

Much of the current debate about the merit of bilingual programs has developed because of concerns about the standards of English literacy achieved by Indigenous students generally, and by those in bilingual schools particularly. The issue of literacy is regularly raised by governments as an effective barometer of successful schooling, and targets are set to give parents and taxpayers a sense that children are learning 'what they should be' at school. There is no doubt that students who leave school able to read and write competently in English have access to greater opportunities than those who don't. The problem with a standardised literacy target is that it does not take into account different approaches to learning or knowledge. It also does not recognise that there are distinct historical and political reasons why certain groups of students rate lower on literacy skills than others.

While there is acknowledgment by Indigenous and non-Indigenous people that current educational outcomes for students, including those in bilingual schools, reveal a crisis situation, the problems associated with existing bilingual education programs appear to be more about a lack of adequate resources and support than a misguided approach. Indeed, the philosophy behind bilingual education of the first languages of Indigenous students being incorporated into the formal education system is strongly supported by educational research and international human rights conventions.

A focus specifically on bilingual education can fail to acknowledge the complex multitude of factors that contribute to children's lack of achievement in the mainstream education system, including poor health, housing and poverty, all of which may affect a child's attendance and performance at school. Replacing bilingual education with programs based on teaching solely in English will not necessarily improve students' educational experience and may come at considerable cultural cost.

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[138] Letter from a number of Warlpiri educators to the Chief Minister of the NT, the Hon. Dennis Burke, 23 April 1999, written in Warlpiri and English, copy provided at Lajamanu hearings, Rural and Remote Education inquiry, 13 May 1999, at <http://www.hreoc.gov.au/news_info/rural/nt/n1_9_6_9.html>

Chapter 5: Mandatory sentencing and Indigenous youth

> Indigenous people are vastly over-represented at all stages of the juvenile justice and criminal justice systems of Australia. The imperative to reduce this over-representation has long been recognised by governments. Yet despite this, various state and territory governments, riding on a wave of 'law and order' politics, continue to introduce punitive sentencing laws that impact disproportionately on Indigenous people. In this chapter I critique the Northern Territory and Western Australian mandatory detention laws on the basis that they are inconsistent with the widely accepted aim of minimising Indigenous contact with criminal justice processes, breach Australia's international human rights obligations and are bad public policy. I then consider a series of alternatives to sentencing that comply with Australia's human rights obligations and which are consistent with the ultimate goal of reducing the over-representation of Indigenous people in those systems.

The over-representation of Indigenous young people in the juvenile justice and criminal justice systems of Australia remains one of the most critical issues facing Indigenous Australians today. This over-representation exists despite a considerable focus on this issue over the past twenty years, particularly through the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and the National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, or *Bringing them home*.

One of the most important recommendations of the RCIADIC, for example, called on governments and Aboriginal organisations to:

> recognize that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organizations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems, and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families or communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.[339]

Similarly, the *Bringing them home* report stated that 'the over-representation of Indigenous young people in juvenile corrections represented a continuation of earlier removal processes by way of a process of criminalisation.'[340]

The extent of the crisis that faces young Indigenous people is demonstrated by the following statistics:

- In 1993, an Indigenous youth was 17 more times likely to be detained in custody than a non-Indigenous youth. By 1996 this rate had increased so that an Indigenous youth was 21 more times likely to be detained in custody than a non-Indigenous youth;[341]
- Between June 1994 and June 1997 there was a 20 per cent increase in the number of young Indigenous people in detention. The correlative level of over-representation for that period increased from 18.9 in 1994 to 24.61 in 1997;[342] and

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[339] Royal Commission into Aboriginal Deaths in Custody, *National Report, Volume 2*, AGPS, Canberra, 1991, Recommendation 62, p252.

[340] Human Rights and Equal Opportunity Commission, *Bringing them home*, National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, HREOC, Sydney, 1997, p489.

[341] Atkinson, L., *Detaining Aboriginal Juveniles as a Last Resort: Variations From The Theme*, Australian Institute of Criminology, December 1996.

[342] Aboriginal and Torres Strait Islander Commission, *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under The United Nations Convention on the Elimination of All Forms of Racial Discrimination*, February 1999, p100.

- 32% of young people in detention in New South Wales (NSW) in June 1999 were Aborigines or Torres Strait Islanders, despite these communities constituting 1.7% of the total NSW population. Put differently, young Indigenous people in NSW are 15 times more likely to be placed in custody than non-Indigenous people.[343]

For the total Indigenous population, figures for the June 1999 quarter indicate that 76% of all prisoners in the Northern Territory (NT) and 34% of all prisoners in Western Australia (WA) were Indigenous. The rate of imprisonment of Indigenous people in Western Australia was 21.7 times higher than that of the non-Indigenous population. The rates in the other states for which statistics are available are also unacceptably high - 15.7 times higher in South Australia, 12.2 times higher in Victoria, 11.3 times higher in Queensland, 9.9 times higher in the Northern Territory and 5.1 times higher in Tasmania.[344]

The rates at which Indigenous people come into contact with the criminal justice system has not improved in the past decade, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

- From 1988 to 1998, the Indigenous prisoner population (across all age groups) has more than doubled. It has grown faster than non-Indigenous prisoner rates in all jurisdictions. Nationally, Indigenous prison populations have increased by an average of 6.9% per year for the decade. This is 1.7 times the average annual growth rate of the non-Indigenous prison population;[345]

- The number of Indigenous deaths in custody in the decade since the Royal Commission has been 147, compared to 99 in the decade before the Royal Commission.[346] 17.2% of all prison deaths in the 1990s have been Indigenous people, compared to 12.1% in the 1980s.[347]

These statistics are evidence of a legal system that continues to respond inappropriately to the circumstances of Indigenous people.

Roderic Broadhurst, in a recent issue of the Australian and New Zealand Journal of Criminology, states that imprisonment has traditionally been seen as an 'efficient' mechanism for the State to manage race conflicts and cross-cultural inequalities within society.[348] This is a perspective that is increasingly under challenge from 'a pervasive (global) discourse on human rights.'[349] In accordance with this, there has been a recent shift in criminological research from focusing on Indigenous peoples as 'problems' to be managed, to a focus on:

> the settler state and the legacies of (post) colonialism. The subject of interest is the settlers and how they have conceptualised the Indigenous and mobilised the law to legitimate land

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[343] Doherty, L., 'Tragic Black Youth Key to Jail Deaths', *The Sydney Morning Herald*, 6 July 1999, p3, reporting statistics released by the NSW Department of Corrective Services in July 1999.

[344] Australian Bureau of Statistics, *Corrective Services*, June Quarter 1999, Ref: 4512.0, pp5, 21-22.

[345] Carcach, C., Grant, A. and Conroy, R., *Australian corrections: The imprisonment of Indigenous people*, Australian Institute of Criminology (AIC), *Trends and Issues in Crime and criminal justice: No. 137*, AIC, Canberra, 1999, p2.

[346] Dalton, V., *Aboriginal deaths in prison 1980 to 1998: National overview*, Australian Institute of Criminology (AIC), *Trends and Issues in Crime and criminal justice: No. 131*, AIC, Canberra, 1999, p2. This figure is to September 1999, and includes the death of two Torres Strait Islanders.

[347] *ibid.*, p6.

[348] Broadhurst, R., 'Crime, justice and Indigenous peoples: the 'new justice' and settler States' (1999) 32(2) *Australian and New Zealand Journal of Criminology* 105, p105.

[349] *ibid.*

theft and manage 'race' conflicts.[350]

In this chapter I focus on one stage of the criminal justice process – sentencing. In particular, I examine mandatory sentencing legislation in Western Australia (WA) and the Northern Territory (NT). These pieces of legislation impose mandatory periods of detention for offenders who commit particular property offences. They are punitive in effect, and impact disproportionately on Indigenous people. They also shift the focus away from dealing with the underlying causes of the offending behaviour.

In the first part of this chapter I explain why the mandatory sentencing laws of the NT and WA breach Australia's human rights obligations and impact disproportionately on Indigenous people. I then consider the social justice imperatives and human rights justifications for alternative approaches which place greater emphasis on redressing the causes of the offending behaviour.

Part 1 - Mandatory sentencing legislation[351]

> The government believes that the proposal for compulsory imprisonment will: send a clear and strong message to offenders that these offences will not be treated lightly; force sentencing courts to adopt a tougher policy on sentencing property offenders; deal with present community concerns that penalties imposed are too light; and encourage law enforcement agencies that their efforts in apprehending villains will not be wasted.[352]

Mandatory detention laws were enacted in Western Australia (WA) and the Northern Territory (NT) in 1996 and 1997 respectively. These laws require courts to impose minimum sentences of detention or imprisonment for people convicted of certain offences. They remove judicial discretion in relation to those offences.

The WA laws came into effect on 14 November 1996 through amendments to the *Criminal Code 1913* (WA). These amendments provide that when convicted for a third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of 12 months imprisonment or detention (the 'three strikes and you're in' legislation).[353] The provisions contain some allowance for both adults and juveniles to be released under supervision.

The NT laws came into effect on 8 March 1997 through amendments to the NT *Sentencing Act 1995* and the *Juvenile Justice Act 1983*.

The *Sentencing Act* provisions apply only to persons aged 17 years or over.[354] Under Section 78A of the *Sentencing Act* persons found guilty of certain property offences shall be subject to a mandatory minimum term of imprisonment of 14 days for a first offence. For a second property offence the mandatory minimum sentence is 90 days. For a third property offence the period of imprisonment is one year.

The NT *Sentencing Act* was recently amended again to provide that courts are not required to impose a sentence of detention under these provisions in certain 'exceptional circumstances'.

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[350] *ibid.*, p107.

[351] I am grateful for the assistance of the Human Rights Unit of HREOC in the preparation of this part. See also Human Rights and Equal Opportunity Commission, *Mandatory detention laws in Australia: An overview of current laws and proposed reform*, HREOC, Sydney, August 1999; Human Rights and Equal Opportunity Commission, *Sentencing Juvenile Offenders*, Human Rights Brief #2, HREOC, Sydney, 1999, available on the internet at: www.hreoc.gov.au/human_rights/brief

[352] The Hon. D Burke, *Hansard*, Legislative Assembly (Northern Territory), 17 October 1996, p9688.

[353] *Criminal Code* (WA), s401(4).

[354] *Sentencing Act 1995* (NT), s4.

However, this applies to adults only and not to juveniles.

Unlike the laws relating to adults which can be invoked at the first conviction, the mandatory detention provisions relating to juveniles in the NT require at least one prior conviction. Under section 53AE of the NT *Juvenile Justice Act* a person aged 15 or 16 years who has been convicted of a relevant property offence and has had at least one prior conviction for such an offence must be subject to detention for at least 28 days. Furthermore, the court may impose an additional 'punitive work order' provided its effect is not to release the child from the requirement to serve the mandatory sentence.[355]

The NT criminal justice system treats people as adults once they attain the age of 17 years. This means that 17 year olds will be subject to the adult mandatory detention provisions in the *Sentencing Act*. As indicated above, those provisions are not limited to repeat offenders and can be invoked on a first conviction. In addition, under the *Juvenile Justice Act* a person who turns 17 while serving a term in a juvenile detention facility is required to be transferred to an adult prison to serve out the remainder of the sentence.

For the purpose of the NT mandatory detention provisions, relevant property offences include:

- theft (irrespective of the value of the property, and excluding theft when the offender was lawfully on premises);
- criminal damage;
- unlawful entry to buildings;
- unlawful use of vessel, motor vehicle, caravan or trailer (whether as a passenger or driver);
- receiving stolen goods (regardless of value);
- receiving after change of ownership;
- taking reward for the recovery of property obtained by criminal means;
- assault with intent to steal; or
- robbery (armed or unarmed).[356]

Mandatory detention and human rights standards

There are two United Nations (UN) human rights treaties that are particularly relevant in relation to mandatory detention laws. They are the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CROC). Australia ratified these treaties in 1980 and 1990 respectively. Consequently Australia is bound to comply with their provisions.[357]

In addition to binding treaties, there are various standards and guidelines promulgated through the UN that elaborate on the basic principles set out in these treaties, namely:

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[355] *Juvenile Justice Act 1983*, s53AE.

[356] *Sentencing Act 1995* (NT), Schedule 1.

[357] While the responsibility for compliance resides with the federal government, international law makes clear that international treaty obligations also apply to states and territories within nations. Article 27 of the *Vienna Convention on the Law of Treaties* provides, for example, that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Similarly, the Committee on the Elimination of Racial Discrimination, in considering Australia's most recent periodic report to the Committee, expressed concern that 'Although the Commonwealth government is responsible for ratifying international human rights instruments, the implementation of their provisions requires the active participation of the states and territories which have almost exclusive jurisdiction over many of the matters covered by the Convention ...' As a consequence of this, and in relation to the treatment of Indigenous Australians, the Committee expressed the view that 'The Commonwealth Government should undertake appropriate measures to ensure the harmonious application of the provisions of the Convention at the federal and state and territory levels.' Committee on the Elimination of Racial Discrimination, *Concluding observations on Australia*, 19 April 1994, UN Doc A/49/18, paras 542, 547.

- The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* (Beijing Rules),
- The *United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines)*, and
- The *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty 1990*

While these instruments do not have the status of binding law they are highly authoritative and persuasive and can in fact acquire binding status by incorporation into treaties. They have the broad support of the international community through their adoption by the General Assembly. Australia was a leading participant in the drafting of these instruments and sponsored them at the General Assembly stage. The Committee on the Rights of the Child has extensively relied upon these instruments as detailing the contents of key articles of CROC, particularly Articles 37 and 40.

Laws that provide for mandatory detention violate principles of the ICCPR. Similarly, they breach a number of provisions of CROC.[358] In considering Australia's first report under CROC, the Committee on the Rights of the Child expressed its concern at these pieces of legislation:

> 21. The situation in relation to juvenile justice and the treatment of children deprived of their liberty is of concern to the Committee, particularly in light of the principles and provisions of the Convention and other relevant standards such as the Beijing Rules, the Riyadh Guidelines and the United nations Rules for the Protection of Juveniles Deprived of Their Liberty.
>
> 22. The Committee is also concerned about the unjustified disproportionately high percentage of Aboriginal children in the juvenile justice system... The Committee is particularly concerned at the enactment of new legislation in two States, where a high proportion of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high representation of Aboriginal juveniles in detention.[359]

This section details the principles of these treaties that are breached by mandatory detention laws.

A central principle of CROC is the 'best interests of the child'. Article 3.1 states:

> In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The enactment of mandatory detention provisions for juveniles constitutes an 'action concerning children' undertaken by 'legislative bodies'. Neither the Northern Territory nor Western Australian Government has indicated, in the legislation or associated debates and policy statements, that the interests of children were considered in the development of the mandatory detention laws. On the contrary, these provisions are harsh and punitive and were specifically intended to achieve deterrence and retribution rather than rehabilitation.

CROC contains specific provisions dealing with juvenile justice, including sentencing. These include:

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[358] CROC applies to children aged under 18 years of age. Article 1, CROC. The focus of this section is on the children under the age of 18 years, though the analysis of the ICCPR also applies to people over the age of 18 years.

[359] Committee on the Rights of the Child, *Concluding observations on Australia*, 10 October 1997, UN Doc. CRC/C/15/Add.79, paras 22, 23.

- Article 37(b): No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

- Article 40.2(b): Every child... accused of having infringed the penal law has at least the following guarantees: (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

- Article 40.4: A variety of dispositions... shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

In addition, the ICCPR provides:

- Article 9: No one shall be subjected to arbitrary arrest or detention; and

- Article 14.5: Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

These provisions embody a number of fundamental principles of juvenile justice.

Detention as a sentence of last resort

Article 37(b) of CROC requires that imprisonment or detention must be a sentence of last resort for all juvenile offenders. The *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* elaborate on this principle:

> Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.[360]

Mandatory detention laws, by contrast, make detention the penalty of sole resort for offences that fall within their provisions. This is a direct violation of Article 37(b). Furthermore, mandatory detention laws remove judicial discretion to consider other alternatives to detention.

Members of the judiciary have expressed concern at laws that remove judicial discretion. As former Chief Justice of the High Court, Sir Garfield Barwick, stated in 1970:

> It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.[361]

Justice Adams of the Supreme Court of New South Wales has also expressed concern that mandatory sentencing laws impinge upon one of the fundamental principles of the Westminster system, the separation of powers:

> One of the crucial aspects of this debate...concerns the independence of the judiciary. In

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[360] *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, Rule 2.

[361] *Pulling v Corfield* (1970) 123 CLR 52 per Barwick CJ at p58; cited in Cowdery, N., *Mandatory Life Sentences in New South Wales* (1999) 22(1) *University of NSW Law Journal* 290.

> proposing schemes...of mandatory ...sentences, the politicians are...calling into question the sentencing patterns and procedures that have been developed by courts in accordance with statutes of long standing. To do so without any attempt at reasoned justification or to analyse the alleged shortcomings of the existing sentencing regimes...seriously undermines public confidence in the courts...
>
> The assertion by the elected politicians of the right, in effect, to impose particular sentences for particular crimes, as a response to immediate political exigencies is a significant interference with traditional and well settled principles of the separation of powers.[162]

The Australian Women Lawyer's Association has also expressed concern that the effect of the loss of judicial discretion in sentencing prisoners under mandatory detention laws has a disproportionate impact on Indigenous women. This is because women generally are otherwise given more lenient sentences due to mitigating circumstances such as their familial responsibilities, the petty nature of the crimes for which they are convicted, and the unlikelihood of recidivism.[163]

For the shortest appropriate time

Article 37(b) of CROC also requires that imprisonment or detention, if it must be imposed, shall be for the shortest appropriate period of time. What is 'appropriate' can be determined only by reference to the individual case rather than a blanket statutory rule of the type that applies in mandatory detention laws. What is 'appropriate' in the individual case is guided in the first instance by the principle of the best interests of the child.

Article 40 of CROC also imposes limits on what is appropriate. The State and the courts are limited in how they may treat a young offender. All action must be 'consistent with the promotion of the child's sense of dignity and worth', must take into account the child's age and also 'the desirability of promoting the child's re-integration and the child's assuming a constructive role in society'. Here the principle of 'rehabilitation' is clearly spelt out as the aim of actions taken in the case of all juvenile offenders.

The principle of rehabilitation is reinforced in the Beijing Rules. The commentary to Rule 17 states that 'strictly punitive approaches are not appropriate'. In sentencing a juvenile offender, 'just desert and retributive sanctions ... should always be outweighed by the interest of safeguarding the well-being and the future of the young person.'[164]

The mandatory detention laws in the Northern Territory and Western Australia, by mandating minimum sentences for certain specified offences, breach the requirement that detention be for the shortest appropriate time. For some at least, who may be prosecuted under these laws, a shorter sentence will be 'appropriate'.

Significantly, both the WA and NT laws are more restrictive in the time periods imposed on juveniles than for adults.

> Both pieces of legislation are more harsh on children than adults. In the NT young offenders receive multiples of 28 days, whereas adults (those 17 and over) receive multiples of 14 days for the same offence. In WA, children must serve half of their sentence (six months) before becoming eligible for release under supervision, whereas adults need serve

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[162] Adams, M (The Hon Justice), 'Launch ... UNSW Law Journal Forum on mandatory detention' (1999) 22(1) *University of NSW Law Journal* 257.

[163] Australian Women Lawyer's Association, *Submission to Senate Legal and Constitutional Legislation Committee inquiry into mandatory detention laws*, October 1999.

[164] See also *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, Rules 1, 3.

only one third (four months).[365]

This is in direct breach of the obligations in Articles 37(b) and 40 of CROC. It is also inconsistent with the intention of the *Juvenile Justice Act* (NT). The preamble to that act states the intention of the act as being:

> that juveniles be dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where appropriate, by means of admonition and counselling) and to extend to juveniles the same rights and protections before the law as apply to adults in similar circumstances.

Must not be arbitrary

Both Article 37(b) of CROC and Article 9 of the ICCPR require that detention must not be 'arbitrary'. Generally, 'arbitrary' has been interpreted as referring to actions that are 'unjust'.[366] Thus 'arbitrary' detention is detention 'incompatible with the principles of justice or with the dignity of the human person'.[367] Relevant in the Australian context are the accepted sentencing principles relating to individually tailored sentencing such as proportionality between the sentence and the offence.[368] On that criterion alone, mandatory detention falls outside accepted principles of just sentencing.

Sentencing may still be arbitrary notwithstanding that it is authorised by law. The term 'arbitrary' includes not only actions that are unlawful per se but also those that are unjust or unreasonable.[369] In 1990, in the case of *Alphen v The Netherlands*, the Human Rights Committee stated:

> The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.[370]

The question whether a particular restriction on liberty is necessary and reasonable or arbitrary for the purposes of the ICCPR is not a matter of purely subjective judgement. The jurisprudence of the Human Rights Committee indicates that, to avoid the taint of arbitrariness, detention must be a *proportionate* means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights.[371]

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[365] Bayes, H., 'Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory' (1999) 22(1) University of NSW Law Journal 286, p286.

[366] Arbitrary is a term with a wide range of meanings. The ICCPR drafting committee explicitly acknowledged, in the final stages of its consideration of Article 9, that it is a word that is commonly ... ed in domestic law to provide that something is 'according to law'. The drafting committee acknowledged this and decided that the term 'arbitrary' should not be excluded because it can mean 'legally valid' and is commonly interpreted as such in many countries and their courts. M J Bossuyt *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights* Martinus Nijhoff Publishers, Boston, 1987, p201.

[367] *Ibid*, pp198, 201.

[368] *Veen v The Queen (No 2)* (1988) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ, p472.

[369] Documentary references and a summary of these debates are given in M. Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, p343.

[370] Communication No. 305/1988, Human Rights Committee Report 1990, Volume II, UN Doc. A/45/40, paragraph 5.8.

[371] In *A v Australia*, Communication No. 560/1993, the Committee stated 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context'. Views of the Human Rights

George Zdenkowski has suggested that the particular crimes targeted by the NT and WA mandatory detention laws are inappropriate:

> While certain property crimes are targeted, there is no evidence that they are the source of greater social harm than non-targeted property offences (especially as there is no requirement of seriousness) or indeed, offences involving personal violence.[172]

Helen Bayes has also argued that while 'the NT law has reduced sentencing to a mathematical formula based on technical definitions, not individual circumstances ... instead of reducing inconsistencies, it has actually increased them.'[173] Similarly, in relation to WA, she argues that inconsistencies in treatment can also arise because of the way that the three strikes are counted:

> In WA, the question of what counts as a 'strike' has become an important point. If a child is cautioned by police or referred to the juvenile justice team, this does not count. If the charge is proved but dismissed under s67 of the *Young Offenders Act 1994* (WA) where the court can decide that the child has been punished enough ... it also does not count.
>
> A strike is actually a 'sentencing event', that is, an appearance in court at which a sentence is given for one or more specified offences. If a child is separately sentenced for three trivial offences within a short space of time, the last offence will attract a mandatory 12 months. If, however, the same three offences are dealt with together by the court, they constitute only one event.[174]

These examples form a further basis for finding that the WA and NT provisions are arbitrary, and in breach of CROC and the ICCPR.

Sentencing that is discriminatory in its impact may also be arbitrary. Where sentencing is influenced by the offender's race, sex, age, religion or other status to the offender's detriment relative to another case that is similar in other respects, the sentencing is arbitrary. Where a pattern of sentencing reveals that certain groups of children are more likely to receive the harshest penalties, sentencing is suspect.[175] Concern has been expressed that the NT and WA mandatory detention laws do in fact discriminate against Indigenous people and certain other groups.

> On the face of it, mandatories are not discriminatory. Indeed they appear to be the very opposite; they allow for no differentiation according to race, sex or age. However, it is clear that mandatories are discriminatory in effect. ... (they) involve the policy choice to select certain types of criminal activity for special attention. These policy choices invariably involve the selection of offences ... in which minority groups and lower socio-economic groups are over-represented. ... Recent research[176] has confirmed expectations with the three strikes burglary laws (in WA); Aboriginal children constituted a staggering 80 per cent of the three strikes cases in the Children's Court of Western Australia from February 1997 to May 1998.[177]

Committee, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993.

[172] Zdenkowski, G., 'Mandatory imprisonment of property offenders in the Northern Territory' (1998) 22(1) *University of New South Wales Law Journal* 302, p303.

[173] Bayes, H., *op cit*, p287.

[174] *Ibid*.

[175] Human Rights and Equal Opportunity Commission *Human Rights Brief No 2: Sentencing Juvenile Offenders*, p5.

[176] Stokes, C., *Three strikes and you're in: Mandatory minimum sentences for repeat home burglars in Western Australia*, Unpublished Honours thesis, University of Western Australia, 1998.

[177] Morgan, N., 'Capturing crims or capturing votes? The aims and effects of mandatories' (1999) 22(1) *University of New South Wales Law Journal* 267, p272.

In relation to the operation of the NT laws, the National Children's and Youth Law Centre has stated:

> While there are few reliable estimates of how many people have been gaoled under mandatory sentencing laws since they took effect in mid-1997, those Territorians familiar with the effects of the regime say it runs into the hundreds. The majority of those sentenced have been young, Aboriginal men.[378]

The Australian Women Lawyer's Association has also expressed concern at the disproportionate impact of mandatory sentencing legislation in the NT on Indigenous women. They have estimated, based on figures from the Northern Territory Correctional Services Department, that there was a 223% increase in the number of Indigenous women incarcerated in the first year of operation of the legislation. As of 30 June 1999, Indigenous women made up 91% of all women prisoners – an increase on the figure in previous years.[379]

The Joint Standing Committee on Treaties, in its review of Australia's obligations under the Convention on the Rights of the Child stated that the mandatory detention provisions in WA and NT breach the principles contained in Article 37(b) of CROC:

> Mandatory sentencing does not take into account the child's age, the facts of the current offence, the individual circumstances of the person, consideration of an appropriate period of time or the application of judicial discretion. Mandatory detention restricts the court's capacity to ensure that the punishment is proportional to the seriousness of the offence and in relation to the rehabilitative options. These minimum sentences are in contravention of Article 37(b) of the Convention which requires that deprivation of liberty not be arbitrary and is a measure of last resort.[380]

Must be proportionate

Article 40.4 of CROC requires that the sentence imposed be proportionate to the circumstances of both the offender and the offence. This is a further statement that sentencing, in the case of juveniles at least, must be individually tailored. Mandatory detention laws do not consider the individual circumstances of the offender.

The principle of proportionality is described in more detail in the commentary to Beijing Rule 5:

> The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example, social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reaction (for example by having regard to the offender's endeavour to indemnify the victim or to his or her willingness to turn to a wholesome and useful life).

Proportionality must also refer to general principles of sentencing and community standards. A sentence is disproportionate if it is guided by aims that are unjust, merely punitive or inhumane. Government and parliamentary statements associated with enactment of the mandatory detention laws in the Northern Territory and Western Australia make it clear that those laws are punitive in intent.

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[378] National Children's and Youth Law Centre, 'Mandatory Sentencing Continues to Disgust', *Rights Now*, July 1999.

[379] This is based on unofficial Department of Correctional Services (NT) figures for the 1998-99 financial year. In numerical terms there were 43 Indigenous women imprisoned in the 1995-96 financial year, increasing to 225 in 1997-98 and 276 in the 1998-99 financial year. Australian Women Lawyer's Association, *op cit*.

[380] Joint Standing Committee on Treaties, *1st Report, the United Nations Convention on the Rights of the Child*, Parliament of Australia, Canberra, August 1998, p365. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for children in the legal process*, ALRC HREOC, Sydney, 1997, para 19.63; Recommendations 241-242.

Outcomes in a number of cases prosecuted under these laws strongly support claims that they are unjust in their operation. They illustrate, among other things, the trivial nature of most of the offending behaviour relative to the penalty imposed. The following examples relate to the Northern Territory.

Children[58]

- Two 17 year old girls with no previous criminal convictions were both sentenced to 14 days in prison for theft of clothes from other girls who were staying in the same room.
- A 17 year old girl with no prior convictions was sentenced to 14 days in prison for receiving jewellery stolen by other young people. The jewellery was later recovered.
- A young offender broke into a toy shop and stole some computer games. He was detained for 14 days even though he confessed to police and his parents paid compensation to the owner of the shop.
- Two young apprentices were each imprisoned for 14 days for first offences. One of them broke a window and the other broke a light worth $9.60.
- A 17 year old boy was incarcerated for 28 days in an adult prison for a second conviction of minor theft. If the second offence had been committed on or after his 17th birthday the period of imprisonment would have been 14 days only.
- A 15 year old girl was detained for 28 days for unlawful possession of a vehicle. In fact she was only a passenger in a stolen vehicle.
- A 17 year old petrol sniffer from an Aboriginal community was sentenced to seven months plus 120 days for stealing food, alcohol, cigarettes, soft drink and petrol and causing associated minor property damage. The stolen items were consumed with friends. His sentence was based on the mandatory detention formula (120 days) with an additional seven months. He had very little family support and his record was clean until June 1998.

Adults

- A 24 year old Indigenous mother was sentenced to 14 days in prison for receiving a stolen $2.50 can of beer.
- A 27 year old white teacher disputed the quality of a hotdog at a Darwin fast food bar and poured water onto the till. She paid in full for the damage she caused. She was sentenced to 14 days in prison.
- An 18 year old Indigenous man obeyed his father and admitted to police that he stole a $2.50 cigarette lighter. He was sentenced to 14 days in prison.
- A 29 year old homeless Indigenous man wandered into a backyard when drunk and took a $15 towel. It was his third minor property offence. He was imprisoned for one year.
- A 20 year old man with no prior convictions was sentenced to 14 days in prison for theft of

[58] Note: These examples include 17 year olds who are treated as adults under the NT criminal justice system and are therefore subject to the adult mandatory detention provisions in the *Sentencing Act*. Not all the examples are of Indigenous children.

$9.00 worth of petrol; and

- An 18 year old man was sentenced to 90 days in prison for stealing 90 cents from a motor vehicle.[382]

Proportionality must also refer to the specified and internationally agreed aims of juvenile justice: the rehabilitation or re-integration of the young offender and the protection and promotion of his or her best interests. There is strong evidence that detention is relatively ineffective in promoting rehabilitation.[383] With mandatory detention, the overriding aim is incapacitation and not rehabilitation.

The High Court has indicated that the principle that the penalty imposed must be proportionate to the offence outweighs policy concerns of incapacitation:

> (I)t is now firmly established that our common law does not sanction preventative detention. The fundamental principle of proportionality does not permit the increase of sentence imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.[384]

Must be capable of review

Article 40.2(b) of CROC and Article 14.5 of the ICCPR require that both the conviction and sentence be capable of review 'according to law'. The Human Rights Committee has interpreted the phrase 'according to law' in Article 14.5 of the ICCPR as 'not intended to leave the very existence of the right to review to the discretion of the States parties.'[385] The mandatory detention laws in Northern Territory and Western Australia do not allow for a right of appeal against the sentence and breach the ICCPR and CROC.

Part 2 - Social justice and mandatory sentencing

The impact of over-representation of Indigenous young people in the juvenile justice and criminal justice systems continues to be a substantial concern to Indigenous people and governments. Reducing this over-representation is a pre-requisite for the achievement of social justice for Indigenous Australians. It is against the backdrop of this imperative that alternatives to mandatory sentencing legislation must be considered.

I commence this section by highlighting two aspects of the contact of Indigenous young people with criminal justice processes that must be addressed if laws and policies are to be effective in reducing the over-representation of Indigenous people in criminal justice proceedings. These factors are the social and economic conditions faced by Indigenous young people, and the impact of detention as a response to the circumstances that lead to their offending behaviour. I

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[382] Sources: Schetzer, L., 'A year of bad policy: mandatory sentencing in the Northern Territory', 23(3) *Alternative Law Journal* 117, p118; HREOC, *Mandatory detention laws in Australia: An overview of current laws and proposed reform*, *op.cit*, pp5-6. An interesting comparison to these examples is the cost of accommodating prisoners in the NT. The 1995-96 NT Correctional Services Annual Report stated that it costs $12,432 to accommodate each young person sentenced to a 28 day period of detention, whereas the cost to the public purse for every adult sentenced under mandatory sentencing for the minimum 14 day period is approximately $2,400: Schetzer, L., *ibid.*, p119. Mandatory sentencing also imposes greater costs on the court system, as accused parties are more likely to contest charges than plead guilty.

[383] There is also evidence that mandatory detention is of limited effect as a deterrence mechanism. See further: Schetzer, L., *ibid.*,pp119-120; Zdenkowski, G., *op.cit.*,pp302-303; Hogg, R., 'Mandatory sentencing laws and the symbolic politics of law and order' (1999) 22(1) *University of New South Wales Law Journal* 262; Morgan, N.,*op.cit*, pp268-269.

[384] *Chester v R* (1988) 165 CLR 611, per Mason CJ, Brennan, Deane, Toohey and Gaudron JJ, p618.

[385] McGoldrick, D. *The Human Rights Committee*, Clarendon Press, Oxford, 1991, p431.

then consider alternative approaches to mandatory detention laws for redressing this behaviour.

The impact of detention

The effects of incarcerating Indigenous young people can be devastating. Incarceration is generally accepted as being ineffective in rehabilitating offenders. As the Northern Territory Department of Corrective Services has acknowledged:

> The evidence is clear that the more access juveniles have to the criminal justice system the more frequently and deeper they will penetrate it... it has been shown that punishment of criminal offenders through incarceration in a juvenile detention centre or a prison...has little positive effect. What happens in many cases is that the detainees learn from their fellow inmates how to become more effective in committing crime.[386]

Incarceration can have the effect of limiting the development of the necessary social skills for that individual to effectively participate in society. The process of institutionalisation is a method of separation.

The *Bringing them home* report considered the effects of separation against the inherent values of attachment. It noted that attachment helps the individual to achieve full intellectual potential, attain cultural identification, sort out perceptions, know the importance of family, think logically, develop a conscience, become self-reliant, cope with stress and frustration, handle fear and worry, and develop future relationships.[387] The earlier the detachment and the displacement, the more diminished is the persons capacity to develop these quality life skills.

But for Indigenous peoples, it is not merely these life skills that ensure our survival. It is also the specific 'cultural life skills' that make us the peoples that we are. The effects of the loss of our cultural life skills can not be underestimated. The report included the confidential evidence of stolen people, and the following excerpts are valuable when considering the effect that the loss of cultural skills has upon the individual separated:

> ...anyway, when I came back I couldn't even speak my own language. And that really buggered my identity up. It took me 40 odd years before I became a man in my own people's eyes, through Aboriginal law. Whereas I should've went through that when I was about 12 years of age. (man, SA)[388]

The effect upon the family left to cope with the loss is no less damaging to the spirit. As one person recounted:

> My parents were continually trying to get us back. Eventually they gave up and started drinking. They separated. My father ended up in jail. He died before my mother. On her death bed she called his name and all us kids. She died with a broken heart. (woman, NSW)[389]

My predecessor commented in 1995 that:

> We despair watching the impact of incarceration on our young people. Fourteen year olds come home street-wise sullen men. The current system damages our children, while doing nothing to protect our communities and protect the wider community in any lasting way.[390]

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[386] NT Correctional Services Department, *Information on Departmental Juvenile Justice Services in the NT*, Northern Territory Government, Darwin, 1991, cited in Schetzer, L., *op cit*, p119.

[387] HREOC, *Bringing them home*, *op.cit.*, p182.

[388] *ibid*, p203.

[389] *ibid*, p213.

[390] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995*, AGPS, Canberra, 1996,

The consequences of detention must be fully considered in determining the appropriate response of the State to the conduct of offences such as those that are targeted by mandatory detention provisions. These consequences must also be considered in light of the recognised correlation between the disadvantage faced by young Indigenous people and their involvement in the criminal justice system.

Social and economic disadvantage

As the statistical profile in chapter 2 demonstrates, Indigenous youth suffer great disadvantage across all socio-economic indicators. The Royal Commission into Aboriginal Deaths in Custody graphically illustrated the correlation between social and economic disadvantage and the over-representation of Indigenous people in the criminal justice system:

> Changes to the operation of the criminal justice system alone will not have a significant impact on the number of Aboriginal persons entering into custody or the number of those who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant in over-representation.[391]

In relation to young Aboriginal people and the criminal justice system Commissioner Johnston stated:

> Socio-economic factors are a critical determinant in crime... criminal statistics consistently show an over-representation of the poor, unemployed, those living in particular socio-economic areas, in property, street crime and public order offences, 'as perpetrators and as victims'... The significant number of property offences committed by Aboriginal youth would seem to indicate, in part, that economic factors are a significant motivation in crime.[392]

Bringing them home argued that 'Child welfare and juvenile justice law, policy and practice must recognise that structural disadvantage increases the likelihood of Indigenous children and young people having contact with welfare and justice agencies. They must address this situation.'[393]

Socio-economic disadvantage is a relevant factor in explaining the impact of mandatory detention provisions. As Helen Bayes has stated:

> What is not acknowledged by the politicians is that many of these young offenders are children who have suffered years of physical and emotional neglect, have effectively been abandoned by their families and the welfare system, and are trying to live independent of violent and abusive homes. These are children and young people who have learned to live by their wits and whose survival may already have depended on it.[394]

Socio-economic conditions are a highly relevant factor in explaining the disproportionate impact of those laws on Indigenous people. The following cases highlight the economic and social disadvantage of many young people affected by the Northern Territory mandatory detention laws.[395]

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p23.

[391] Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 4*, AGPS, Canberra 1991, p1.

[392] Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, AGPS, Canberra 1991, p287.

[393] HREOC, *Bringing them home*, *op.cit.* p556.

[394] Bayes, H., *op.cit.*, p286.

[395] Human Rights and Equal Opportunity Commission, *Mandatory detention laws in Australia – An overview of*

- Robert is a 15 year old Aborigine. He was first referred to the Department of Family, Youth and Children's Services when he was 12 due to a lack of parental support. Since the age of 14 Robert has mostly looked after himself. This year he attempted suicide while in police custody, having been arrested for a mandatory detention offence. The offence was one of property damage. He broke a window after hearing about the suicide of a close friend.

- Andrew is a 17 year old Aborigine. He lives in a town camp outside of Alice Springs. He is well known to youth services in Alice Springs, having accessed the court system and income and accommodation support since he was 15. His literacy skills are low and English is his third language. As with many young people in Alice Springs, Andrew has been identified as high risk and survived a suicide attempt recently. He was charged with a mandatory detention offence when he was 16 years old.

- Tony is 17 years old and lives between Alice Springs and several bush communities. Tony has been accessing crisis accommodation with youth services since he was 14 years old. He has a history of multiple substance dependency. Tony has minimal education and his literacy skills are low. English is his third language. He has never had his own income and workers who know him believe the bureaucracy of the system and the excessive paperwork is what deters him from accessing this entitlement. Tony is considered to be an adult in the Northern Territory. He has been charged with a mandatory detention offence (unlawful entry into a shop) and is facing imprisonment in an adult jail.

Having noted the correlation between Indigenous disadvantage and offending behaviour the Royal Commission into Aboriginal Deaths in Custody made numerous recommendations which emphasised that state and territory legislative and administrative policies on sentencing should reflect the principle that imprisonment be a sanction of last resort and that alternatives to imprisonment should be utilised wherever possible.

Chapter 2 of this report also outlined the obligations on governments under ICESCR to redress the disadvantage faced by Indigenous young people. These obligations include the development and implementation of sufficient programs that are focused on progressively realizing the rights of Indigenous people, as well as ensuring that the level of rights enjoyed does not fall below a core minimum level. Policies and programs for the sentencing of Indigenous offenders should be considered alongside these obligations.

To the extent that there is a link between the involvement of young Indigenous people in the criminal justice system and the failure of the State to meet its obligations to redress the inequality and disadvantage faced by Indigenous youth, a response by the State that mandates detention – with no regard to the circumstances of the offender - can be seen as the antithesis of social justice.

Alternatives to mandatory detention

This section explains how Australia's human rights obligations support and in some instances require the development of positive alternatives to mandatory detention. In particular it considers three main alternatives:

- 1) Crime prevention programs;
- 2) Diversionary programs; and
- 3) Non-custodial sentencing options.[396]

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current laws and proposed reform, *op cit*., pp 6-7. Names have been changed to avoid identification.

[396] See further: Human Rights Commissioner, *Submission to the Senate Legal and Constitutional Legislation Committee inquiry into mandatory sentencing*, Human Rights and Equal Opportunity Commission, Sydney, 1999.

All three categories represent alternatives to mandatory detention that are more consistent with human rights standards such as the 'best interests of the child' principle, and which are more humane, effective and potentially less costly in reducing juvenile crime and promoting community safety. I examine a framework for positive and effective strategies to deal with juvenile offending through means other than (mandatory) detention.

1) Crime prevention programs

The most effective anti-crime programs are the ones that address poverty, homelessness, discrimination, child abuse and neglect, family breakdown, exclusion from education and other problems. Programs that provide support for people at risk of offending are the most successful in preventing crime.

The Riyadh Guidelines confirm the importance of preventive programs in addressing juvenile offending:

> 1. The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes.
>
> 2. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.

The Beijing Rules also provide that States should promote 'juvenile welfare to the greatest possible extent, which will minimize the necessity of intervention by the juvenile justice system, and in turn, will reduce the harm that may be caused by any intervention. Such care measures for the young... are basic policy requisites...'[397]

These principles have been reinforced in other research. Early intervention and social support programs are essential as a means of protecting against later offending. They are relatively inexpensive and have major long term benefits in terms of children's physical and social development. Intervention and welfare programs are far less effective once young people have reached their late teens and are already in a lifestyle of offending.

A research report commissioned by the Commonwealth Government as part of the National Crime Prevention Strategy states:

> The risk of crime is exacerbated by creating a community that is not inclusive of a diversity of families and youth, and it is exacerbated by not providing meaningful social pathways for its members. In the past 25 years, the percentage of dependent children living below the poverty line has nearly doubled (King, 1998), increasing greatly the number of young people who are denied the opportunity to participate in social and economic life. Programs such as quality pre-school education, poverty alleviation, and practical provisions (e.g. adequate housing) are strategies which attempt to compensate for the impact of these trends and promote the attachment of individuals and communities to mainstream social supports and developmental institutions. These social institutions form an essential backdrop to a targeted crime prevention program through the creation of a 'child friendly' society, a society which fosters meaningful social pathways and membership for its citizens.[398]

Part III; Australian Law Reform Commission and HREOC, *Seen and heard: priority for children in the legal process*, ALRC, Sydney, 1997, (Herein *Seen and Heard*), chapters 18-20.

[397] *United Nations Standards Minimum Rules for the Administration of Juvenile Justice*, Commentary on Part I.

[398] National Crime Prevention, *Pathways to Prevention - Early Intervention*, Report No.6, AusInfo, Commonwealth of Australia, 1999, <http://ncp.gov.au/ncp/division_3/html/over06.htm>.

CROC contains detailed provisions that recognise the importance of early intervention and support programs for children and their families. They include a recognition in the preamble of the Convention that the 'family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community' and the 'best interests of the child' principle in Article 3.1. Further provisions of CROC provide that:

- The State 'shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities' (Article 18.2);
- 'A child...deprived of his or her family environment...shall be entitled to special protection and assistance provided by the State' (Article 20.1);
- Every child has 'the right to the highest standard of health and to facilities for the treatment of illness and the rehabilitation of health'(Article 24.1);
- Every child has the right 'to benefit from social security'(Article 26.1);
- Every child has the right 'to a standard of living adequate for his or her physical, mental, spiritual moral and social development.' (Article 27.1); and
- Every child has the right to education (Article 28), which shall aim at developing the child's personality, talents and mental and physical abilities to the fullest extent. Education shall prepare the child for an active adult life in a free society and foster respect for the child's parents, his or her own cultural identity, language and values, and for the cultural background and values of others (Article 29).

The Riyadh Guidelines state that comprehensive prevention plans should be instituted at every level of government.[399] The Guidelines place particular emphasis on:

- preserving and supporting the family as the central unit of society responsible for children;[400]
- the central role of the education system in crime prevention;[401]
- the importance of community based crime prevention programs;[402] and
- the ultimate responsibility of governments to prioritise and adequately resource youth crime prevention programs.[403]

The recommendations of *Bringing them home* provide a framework for early intervention programs relating to Indigenous young people that are consistent with these principles and guidelines. The report recognised that social and economic disadvantage facing Indigenous people are among the root causes of contemporary removal. Consequently, the report recommended that the Council of Australian Governments address this by:

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[399] Riyadh Guidelines, Guideline 9.

[400] *ibid.*, Guidelines 11-19.

[401] *ibid*, Guidelines 24-26, 30.

[402] *ibid*, Guidelines 32-35.

[403] *ibid*, Guidelines 9, 45.

- developing a social justice package for Indigenous families and children, the package to be developed in true partnership, not consultation, with ATSIC, the Council for Aboriginal Reconciliation, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner and relevant Indigenous organisations; and

- pursuing the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody which deal with issues of social disadvantage.[404]

The report also stated that fundamental to redressing this disadvantage is the involvement of Indigenous people in the design and delivery of programs. Accordingly, the report recommended that processes be established for the implementation of the principle of self-determination in relation to the well-being of Indigenous children.[405]

Bringing them home recommended that this should involve national legislation establishing a framework for negotiation at the regional and local community levels on how self-determination is to be implemented. ATSIC, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Secretariat for National Aboriginal and Islander Child Care (SNAICC) and the National Aboriginal and Islander Legal Services Secretariat (NAILSS) should all be involved in negotiations for the legislation.[406]

The report recommended that the legislation have five key principles:

- It should bind every Commonwealth, State and Territory Government;

- As far as possible, Indigenous communities should be free to negotiate measures best suited to their individual needs concerning children, young people and families;

- Negotiated agreements should not be set in stone but should be open to revision when needed;

- Every Indigenous community is entitled to adequate funding and other resources to enable it to provide for families and children and make sure that removal of children is the last resort; and

- The human rights of Indigenous children are to be guaranteed.[407]

In addition, the report recommended that legislation should allow negotiation with local communities on the:

- transfer of legal jurisdiction in relation to children's welfare, care and protection, adoption and/or juvenile justice to Indigenous communities and organisations;

- transfer of police and associated functions to Indigenous communities and organisations;
- all aspects of the relationship between Indigenous communities and police / court system.

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[404] *Bringing them home*, *op.cit.*, Recommendation 42.

[405] The Royal Commission into Aboriginal Deaths in Custody also highlighted this principle. Recommendation 188, for example, states 'That governments negotiate with Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self determination principle is applied in the design and implementation of any policy or programme or the substantial modification of any policy or programme which will particularly affect Aboriginal people.'

[406] *Bringing them home*, *op.cit.*, Recommendation 43a.

[407] *ibid*, Recommendation 43b.

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including Indigenous involvement in policy and program development; and

- funding of programs relating to children, young people and families.[408]

To date, these recommendations have not been implemented by governments, and in fact have been actively rejected by the Commonwealth Government, as well as by Victoria and Queensland.[409]

2) Diversionary programs

Diversionary programs are those that, where appropriate, keep offenders out of the formal court system. They include mechanisms such as cautions and family conferencing. These programs aim to avoid trapping young people with a previously good record in a pattern of offending behaviour.

The *Convention on the Rights of the Child* recognises that diversionary programs are more desirable methods of dealing with young offenders than measures involving recourse to the formal juvenile justice system. Article 40(3) requires State parties to develop a range of measures for dealing with young offenders including:

> (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Provisions in the Beijing Rules reinforce the provisions of Article 40(3)(b). Rule 11.1 provides that consideration shall be given, whenever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority. Rule 11.4 recommends specific types of diversionary programs including those involving temporary supervision and guidance, restitution and compensation of victims. The commentary to Rule 11 states:

> Diversion, involving removal from criminal justice processing, and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems ... In many cases, non-intervention would be the best response ... This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.[410]

Diversionary programs offer significant benefits for both the offender and the community. They avoid the stigma associated with prosecution and they also prevent first minor offenders from being 'contaminated' through contact with serious or recidivist offenders. They provide a process for young people to take some responsibility for their actions. In addition, they may save law enforcement resources and enable funding and personnel to focus on more serious crimes that pose a far greater threat to society. Some diversionary programs that will be appropriate in certain circumstances include the following.

- *Cautioning*

Police have traditionally exercised a discretion to divert young people from the court system by warning or cautioning them. The rules and procedures governing cautioning vary among the States and Territories. However, they generally apply where the offender admits to having

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[408] *ibid*, Recommendation 43c.

[409] Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1998*, HREOC, Sydney 1999, pp167-68.

[410] See also: Riyadh Guidelines, Guideline 5.

committed the offence and the offence is of a relatively minor nature.

Cautioning alone is not necessarily an adequate response to some offences covered by the mandatory detention laws in the NT and WA. However, there may be particular cases where it would be an appropriate response, such as very minor offences involving property of negligible value.

The emphasis of this section is on the principle that cautions should be applied in a fair and consistent manner. Evidence has indicated that some groups of children do not receive the benefit of cautioning at the same rate as the general youth population. For example, in 1994-95 only 11.3% of Aboriginal alleged juvenile offenders in Victoria received formal cautions compared with 35.65% of non-Aboriginal juveniles.[411] This is despite the fact that the Royal Commission into Aboriginal Deaths in Custody recommended that police administrators encourage officers to make greater use of cautioning for Indigenous suspects.[412]

- *Conferencing*

Family group conferencing is increasingly being used in the States and Territories either to divert young offenders from the courts or as a sentencing option. Conferences are a form of restorative justice, a mechanism whereby the offender can accept responsibility and make amends to the victim. New Zealand pioneered the development of family group conferencing and provided the impetus for many subsequent schemes in Australia and elsewhere.

A family conferencing scheme was piloted in Wagga Wagga in rural NSW in 1991. Under that scheme the apprehending officer was able to refer minor matters for conferencing. Police initially conducted the conferences. However, after considerable criticism of the level of police involvement in the scheme, responsibility for administering conferences was transferred to the Department of Juvenile Justice. The NSW Government has since developed a statewide legislative scheme of youth justice conferences based on the New Zealand model.[413]

Western Australia has developed an innovative conferencing model involving juvenile justice teams. Under this scheme, juvenile justice teams consisting of a youth justice co-ordinator, a police officer, a Ministry of Education officer and an Aboriginal community worker can convene family meetings to deal with young people who have been apprehended for minor offences. Young offenders are encouraged to take responsibility for their actions and make amends to their victims. An action plan is developed in consultation with all relevant parties. If the offender complies with the plan he or she does not get a criminal record.

Conferencing schemes have many benefits. The young person generally avoids a conviction and gets a 'second chance'. The rehabilitative aspect of juvenile justice is emphasised, encouraging young people to take responsibility for their actions and learn from their mistakes. Victims and their families have the opportunity to participate meaningfully in the process.

Despite their many positive features, some conferencing schemes have been the subject of criticism. Concerns have included the extent of police involvement, the child's lack of access to legal advice and the severity of penalties imposed.

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411 M Mackay *Victorian Criminal Justice System Fails ATSI Youth: Discussion Paper* Monash University Koori Research Centre, Melbourne 1996, p9.

412 Royal Commission into Aboriginal Deaths in Custody, *National Report – Vol 4, op cit.*, Recommendation 240a.

413 The application of this scheme to Indigenous young people has been criticised: Kelly, L. and Oxley, E., 'A dingo in sheep's clothing? The rhetoric of youth justice conferencing and the Indigenous reality' (1999) 4(18) *Indigenous Law Bulletin* 4. See also the response of the Director of the program to this article: 'Youth justice conferencing: the debate continues' (1999) 4(18) *Indigenous Law Bulletin* 18.

Similarly, despite increased focus in recent years on the chronic over-representation of Indigenous people at all stages of the juvenile justice system, they are still not being diverted from the system at the same rate as non-Indigenous children. This may be due partly to the effect of prior records or the manner of the exercise of discretionary powers in some cases.

In 1996 my predecessor commented on the use of cautions in Western Australia:

> Between August 1991 and December 1994 Western Australian police cautioned 12,887 juveniles: only 12.3 per cent were Indigenous. Considering that Aboriginal representation among juveniles who are charged is as high as 69 per cent, it is clear who is not benefiting from this diversionary option.[414]

The New Zealand experience demonstrates that diversionary schemes have the potential to be very effective for young Indigenous offenders because of the scope for the extended family and community to be involved. However, some Australian models have been criticised because they lack commitment to negotiation with Indigenous communities and fail to recognise the principle of self-determination. Some have involved a 'one size fits all' approach, imposing a rigid model without due regard to the needs and circumstances of particular communities. In addition, there is potential for conferencing to increase the already high level of blaming and stigmatisation directed to young Indigenous people who come into conflict with the law.

Governments should ensure that Indigenous communities are able to develop and run their own family group conferencing models. Existing conferencing schemes should be modified to be culturally appropriate.

To redress these concerns, HREOC and the Australian Law Reform Commission recommended in *Seen and Heard*, the report of the National Inquiry into children and the legal process, that national best practice guidelines for youth conferencing be developed.[415]

To be truly effective in advancing the child's rehabilitation and addressing community concerns about safety and justice, conferencing schemes must be fair and accountable in the way they operate. In developing conferencing schemes, consideration should be given to:

- the desirability of diversionary schemes being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer;
- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence;
- the need to ensure that young people do not get a criminal record as a result of participating in conferencing;
- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person;
- the child's access to legal advice prior to agreeing to participate in a conference;
- whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less *ad hoc*; and
- the need to monitor the overall effect of conferencing schemes to ensure they do not draw

[414] Aboriginal and Torres Strait Islander Social Justice Commissioner *Fourth Report* AGPS Canberra 1996, p38.

[415] *Seen and Heard*, *op cit*, Recommendation 200.

greater numbers of young people into the criminal justice system.

3) Non-custodial sentencing options

The Convention on the Rights of the Child places particular emphasis on non-custodial sentencing options as alternatives to detention. Article 37(b) enshrines the fundamental requirement that detention of children should only be used as a measure of last resort. In doing this, it creates the imperative for non-custodial measures.

Article 40.4 deals more explicitly with non-custodial measures, stating:

> A variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

As well as specifying a number of non-custodial sentencing options, article 40(4) also states the principle of proportionality. This principle requires that the sentence imposed be proportional to the seriousness of the offence. This principle creates a requirement for non-custodial measures because there are some offences where they will be the only proportional response.

The Beijing Rules also emphasise non-custodial options. Rule 18.2 provides that the placement of a juvenile in an institution shall always be a disposition of last resort. Rule 18.1 states that a large variety of disposition measures shall be made available to enable flexibility. They may be combined and should include:

- care, guidance and supervision orders;
- probation;
- community service orders;
- financial penalties, compensation and restitution;
- intermediate treatment and other treatment orders;
- orders to participate in group counselling and similar activities;
- orders concerning foster care, living communities or other educational settings; and
- other relevant orders.

As alternatives to mandatory detention, non-custodial sentencing options are generally far more conducive to the child's rehabilitation. In the case of less serious offences, they represent a fairer and more proportional option than detention. In many cases, they provide an avenue through which the young offender can provide some form of reparation to the victim directly or to society at large.

The Youth Advocacy Centre in Queensland stated the benefits of non-custodial sentencing options are that 'Programs that re-connect children with their communities, mainstream and social institution are more likely to reduce offending and make some changes in a child's life.'[416]

Examples of non-custodial sentencing options include:

- *Probation*: Probation is an order for supervision in the community as an alternative to detention. Probation orders are intended to assist rehabilitation of the child by providing continuing guidance and support. The supervision may include conditions on matters such as reporting, residence, education, employment, personal contacts, counselling and treatment.

[416] Youth Advocacy Centre (Queensland), Submission 120 to *Seen and Heard* inquiry.

- *Conferencing schemes:* Conferencing has been discussed previously as an option for diverting young offenders from the court system. However, conferencing can also pay an important role at the sentencing stage. It can help the court determine an appropriate sentence. It can also be used as a sentencing option, for example conferencing with the victim for the purpose of reconciliation or compensation.

- *Community service orders:* Community service orders involve offenders engaging in unpaid work for the benefit of the community. They normally entail a specified number of hours on an approved work project.

- *Treatment programs:* These include orders catering for offenders with a mental illness or intellectual disability, such as hospital or psychiatric orders, and drug treatment programs.

- *Fines:* Provisions dealing with financial penalties usually set monetary limits for juveniles. However, for some young offenders they are not an appropriate sentencing option. Many young offenders come from financially disadvantaged backgrounds. Indeed, poverty is one of the root causes of offending behaviour. They may have difficulty paying the fine on the terms set by the court. Non-payment may result in the young person being dragged further into the criminal justice system.

Proponents of mandatory detention often claim that there has been a lack of success with other sentencing options. In some cases this may be true but it does not detract from the proven benefits of non-custodial programs and their superiority to detention as a means of promoting rehabilitation. Rather, it reflects the fact that some programs have been inadequately resourced and poorly designed. Criticisms of particular programs do not justify their abandonment in favour of a regime of mandatory detention. On the contrary, they highlight the need for greater commitment by Australian governments to addressing the shortcomings of existing programs and delivering a system of properly resourced and co-ordinated sentencing options that meet the needs of young offenders and the community.

The adequacy of existing non-custodial sentencing options was examined in the *Seen and heard* report. The report concluded that:

- Sentencing options in legislation are not always reflected in the programs available to young offenders. Failure by governments to commit sufficient resources has restricted young people's access to suitable non-custodial programs. This includes lack of residential drug rehabilitation programs, lack of alternatives to mainstream education and lack of adolescent psychiatric inpatient and outpatient services;[417]

- Stringent eligibility requirements and other restrictions on their applications have also limited some potentially effective programs;[418]

- In relation to probation programs, there is often insufficient supervision for young offenders. One reason for inadequate supervision is a lack of available funding. Another is that magistrates and judges may not specify the agency responsible for supervising the child and as a consequence no agency takes responsibility for supervision;[419]

- In relation to community based orders, there is a lack of commitment to these programs by

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[417] *Seen and heard, op cit*, paras 19.65-72. HREOC made similar observations in *Our homeless children – Report of the national inquiry into homeless children*, HREOC, Sydney, 1989 and in *Bush Talks*, HREOC, Sydney, 1999.

[418] *ibid.*

[419] *Seen and heard, op cit.*, paras 19.35-38.

governments – particularly in relation to resourcing. There was also a need for greater streamlining and coordination of programs.[420]

The report recommended the development of national standards for juvenile justice[421] which 'stress the importance of rehabilitating young offenders while acknowledging the importance of restitution to the victim and community.'[422] The report recommended that the national standards include the following principles for sentencing of juvenile offenders:

- the need for proportionality, such that the sentence reflects the seriousness of the offence;
- the importance of rehabilitating juvenile offenders;
- the need to maintain and strengthen family relationships wherever possible;
- the importance of the welfare, development and family relationships of the child;
- the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community;
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways;
- the impact of deficiencies in the provision of support services in contributing to offending behaviour; and
- the need to take into account the special circumstances of particular groups of juvenile offenders, especially Indigenous children.[423]

The report also recommended that these national standards should include a wide range of sentencing options, 'with clearer and more appropriate hierarchies based on minimum appropriate intervention by the formal justice system.'[424] These standards should take the following principles into account:

- Rehabilitation and reintegration into the community should be the primary objective in the development of sentencing options;
- Programs should be tailored as a far as possible to the individual needs and circumstances of young offenders, including the difficulties they may have in complying with certain orders;
- Sentencing options should take into account the special health and other requirements of children and young people. This should include the provision of appropriate drug treatment facilities incorporating both detoxification programs and treatment or referral services. It should also include counselling and other practical programs to assist these young people and their families. These could be run by voluntary, community or church based agencies, by non-profit concerns or by government agencies; and
- Sentencing options for young sex offenders should include specific treatment programs

[420] *ibid*., paras 19.39-45.

[421] *ibid*, Recommendation 192.

[422] *ibid*, Recommendation 198.

[423] *ibid*, Recommendation 239.

[424] *Ibid*., Recommendation 240.

appropriate to this category of offenders.[425]

These recommendations have not been implemented to date.

Conclusion

Mandatory detention laws are the antithesis of social justice. They displace concerns about the impact of contact of Indigenous young people with criminal justice processes as well as the underlying causes of the behaviour that leads to offending. They are inconsistent with best practice standards for criminal justice process and breach Australia's international human rights obligations. As the second part of this chapter demonstrates there are alternatives to mandatory detention that are consistent with the goal, long recognised and accepted by governments, of minimising Indigenous contact with the criminal justice system.

WA and the NT should repeal the mandatory sentencing provisions. As they have chosen not to, the federal Parliament should exercise its constitutional power under section 51(xxix) of the Constitution[426] to bring the law in WA and the NT within Australia's international obligations under CROC and the ICCPR.[427] The passage of overriding legislation by the Commonwealth would send a clear message to the states and territories that they do not have unfettered power to introduce laws that further disadvantage indigenous Australians. It will also re-emphasise and focus states and territories on the fundamental imperative of the Royal Commission into Aboriginal Deaths in Custody, namely reducing the over-representation of Indigenous people in criminal justice processes.

It is timely for the Commonwealth Parliament to do so. As two young Indigenous lawyers have commented:

> Words of reconciliation are meaningless without reducing the disproportionate over-representation of young Indigenous people within Australia's juvenile justice system... Words... are irrelevant to the very immediate concerns of young Indigenous people in this country, especially those sitting behind locked doors. Their prospects are bleak, they are removed from their families and their links to culture have been weakened through absence from community at a crucial developing age. This is what is important when talking about reconciliation.[428]

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[425] *Ibid*

[426] This is the power to make laws relating to external affairs. It is well established that the power allows the Commonwealth Parliament to pass laws that implement Australia's international obligations.

[427] Note: the Commonwealth Parliament would also have the constitutional authority to overturn the mandatory detention provisions in the NT under section 122 of the Constitution, and in relation to Indigenous people, under section 51(xxvi) of the Constitution.

[428] Collings, N., and Jacobsen, R., "Reconciliation with Australia's young Indigenous people' (1999) 5(2) *University of NSW Law Journal Forum* 27, pp27, 30.

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